

Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation

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This Article addresses a critical problem in libel law: when should established procedural rules be altered to protect free speech. The Supreme Court has repeatedly recognized that special or modified procedural rules are necessary to safeguard First Amendment interests. Yet, as Professor Gilles demonstrates, the Court has failed to articulate a rationale for determining what procedural rules should apply in libel cases. Instead, it has proceeded on a case by case basis, granting and denying procedural breaks without explanation. While the process created by the Court seems highly effective at safeguarding free speech interests, a second glance reveals that jury error is rampant, with reversal, remand, and damage reduction rates running at over 70%. Professor Gilles argues that the Court has created a procedural quagmire which serves neither plaintiffs, defendants, nor the First Amendment.

Professor Gilles then reexamines what we mean by First Amendment process. She contends that the problems of the current system stem from the Court's preoccupation with accuracy and its failure to recognize the equally vital goals of speed and efficiency. Professor Gilles argues that if the Court adopted a more balanced approach, giving consistent consideration of all three goals, it could rationalize and improve the process for deciding libel cases. This Article concludes by offering a number of specific reforms toward that end.

"[I]t is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures."¹

I. INTRODUCTION

I have often imagined a debate between Justices Brennan and Black over the case of *New York Times Co. v. Sullivan*.² It goes something like this. It is 1964. Justice Brennan reads his landmark opinion overturning a libel verdict

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¹ *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (O'Connor, J., plurality).

² 376 U.S. 254 (1964).

against the *New York Times* for its coverage of police reaction to civil rights demonstrations in Montgomery, Alabama.³ An Alabama jury had awarded \$500,000 to plaintiff Sullivan, a police commissioner who claimed that he was defamed by inaccuracies in the description of the conflict.⁴

Justice Brennan's opinion is sweeping. He announces that libel law no longer enjoys "immunity" from First Amendment scrutiny.⁵ He holds that public officials cannot recover for libel unless they prove actual malice, that is, that the publisher knew the story was false or acted with reckless disregard as to the accuracy of the report.⁶

As Justice Brennan surveys the jubilant crowd (even law professors are dancing in the street), he spies the unhappy face of Justice Black. "What's wrong?" asks Justice Brennan, somewhat perplexed that this long time supporter of First Amendment freedoms is not celebrating. Justice Black's response is simple: "It won't work. An Alabama jury will give that police commissioner money regardless of your fancy fault standard—you require actual malice, they'll find actual malice. You should have abolished the whole thing."⁷

Justice Brennan responds, "We didn't have the votes to abolish it, but don't worry, I fixed the jury problem—I raised the burden of proof—the plaintiff has to prove actual malice with 'convincing clarity.'⁸ No jury could say there was clear and convincing evidence of actual malice here."

³ The report appeared in a full page advertisement entitled "Heed Their Rising Voices," placed with the *New York Times* by "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The commissioner also sued four African American ministers whose names were listed as endorsing the advertisement. *See id.* at 256. For a fascinating and comprehensive account of the lawsuit see, ANTHONY LEWIS, *MAKE NO LAW, THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

⁴ *See New York Times*, 376 U.S. at 256-62.

⁵ *See id.* at 269.

⁶ *See id.* at 279-80.

⁷ Justice Black's concurring opinion exudes skepticism:

[t]his record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or reduce the half-million-dollar verdict in any amount.

Id. at 295 (Black, J., concurring).

⁸ *Id.* at 285-86. This standard was reformulated as "clear and convincing" evidence in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Justice Black smiles, "Sure they could. This jury said that reporting that demonstrators sang 'My Country, 'Tis of Thee' not the National Anthem, defamed the commissioner: this jury could find actual malice with convincing clarity. What's more, the state courts will uphold it."⁹

Justice Brennan hesitates, but then responds, "Don't worry, we'll change the procedural rules on that too—we will not remand to a jury, we will ourselves independently review the record for clear and convincing evidence of actual malice."¹⁰ And that is what the Court did. It never remanded the case for a jury trial based on the new actual malice standard; rather it performed its own independent review of the record and concluded that clear and convincing evidence of actual malice did not exist.¹¹

I share this imagined exchange, not to demean the two justices—both of whom I respect immensely for their contributions to First Amendment jurisprudence—but rather to illustrate that, from the outset, the Court's reform of libel law presumed that procedural fixes were necessary to protect First Amendment interests adequately. *New York Times* not only adopted the substantive requirement of actual malice, but also switched the burden of proving actual malice and falsity onto the plaintiff;¹² heightened the level of proof to clear and convincing evidence;¹³ and imposed on appellate courts an

⁹ See *supra* note 7 and accompanying text.

¹⁰ See *New York Times*, 376 U.S. at 284–87 (holding that the court must make an independent examination of the whole record, and finding, upon reviewing the record, that there was no showing of actual malice against the newspaper or the individual petitioners). This part of the hypothetical conversation may actually have taken place. See LEWIS, *supra* note 3, at 120–21, 172–81 (reporting that the independent review requirement was the product of negotiations between Justices Black and Brennan, as well as Harlan and Clark, over how to avoid a retrial).

¹¹ See *New York Times*, 376 U.S. at 286–87.

¹² See *id.* at 279–80 (holding that a public official bears the burden of proof that the statement was made with actual malice). The Court in *New York Times* did not expressly hold that a public plaintiff must also prove falsity, however later opinions treated this as implicit in its requirement of knowing or reckless disregard of the truth. See *Philadelphia Newspapers, Inc. v. Hepps*, 75 U.S. 767, 775 (1986) (noting that "[o]ur opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in *New York Times* . . . , a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation."); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (commenting that the plaintiff must "prove a false publication attended by some degree of culpability"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (opining that *New York Times* requires a public plaintiff to establish that "the utterance was false").

¹³ See *supra* note 8.

obligation to independently review the record for evidence of actual malice.¹⁴ The debate in *New York Times* was not over the legitimacy of including these procedural fixes, but rather on whether these fixes would work or whether libel should instead be abolished.¹⁵

This Article reviews how First Amendment process has fared since *New York Times*. I argue that while the Court has recognized that process is vital to the protection of free speech rights, the process the Court has created, at least in the libel area, lacks doctrinal coherence and is ineffective. In Part II.A, I seek to demonstrate that, since *New York Times*, the Court's attitude toward procedural fixes has varied wildly. Sometimes the Court has willingly embraced such alterations, sometimes it has expressly rejected them, and sometimes it has adopted them while denying any alteration has occurred. Throughout, the Court has failed to explain under what circumstances heightened procedural protections will be granted in the name of the First Amendment.

In Part II.B, I charge that the Court's piece-meal modifications of process have proved ineffective for protecting First Amendment rights. The section briefly outlines the progress of a libel suit through litigation under the special procedural rules imposed by the Supreme Court. I assert that, while on first glance this process seems an effective means of protecting free speech (eliminating all but perhaps five to ten percent of plaintiffs' libel suits), closer inspection shows that the system designed by the Supreme Court is expensive, drawn out, and fails to protect expression effectively.

In the final section of this Article, Part III, I return to basics, questioning why we want to create a First Amendment process. I argue that accuracy, speed, and efficiency should be the goals of such a procedure. Viewed from this perspective, I contend that the Court's seemingly conflicting decisions can be explained by an effort to promote accuracy, combined with a failure to recognize the need for speed and efficiency. The problems of the current system stem from this excessive preoccupation with accuracy. I argue that if the

¹⁴ See *supra* note 10; see also David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 494 (1991) (In *New York Times* the Court "greatly expanded judges' control of juries—a development that has had far greater practical effect than the actual malice rule itself."); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 220 (1987) (noting that *New York Times* adopted both substantive and procedural reforms).

¹⁵ The decision was unanimous. Justice Brennan writing for the Court adopted the actual malice rule with procedural safeguards. Justices Black and Goldberg wrote concurring opinions (both joined by Justice Douglas) urging that public officials be barred from asserting libel claims, because, in Justice Black's words, the Court's proposed "stopgap measures" were insufficient to protect free speech. *New York Times*, 376 U.S. at 295 (Black, J. concurring).

Court took a more balanced approach, giving consistent consideration to all three goals, it could greatly improve the process for deciding First Amendment cases, and I offer a number of specific reforms towards that end.

II. A CRITICAL ASSESSMENT OF THE COURT'S RECORD IN FIRST AMENDMENT PROCESS CASES

A. *A Lack of Doctrinal Coherence*

The Court, to put it bluntly, has been schizoid on the issue of procedural¹⁶ accommodations to protect First Amendment values. As Professor Monaghan pointed out in his seminal article, *First Amendment "Due Process,"* even before *New York Times Co. v. Sullivan* the Court had raised the idea that the First Amendment carried with it certain procedural as well as substantive protections.¹⁷ In the obscenity area—the focus of Monaghan's article—the

¹⁶ As Walter Wheeler Cook told us, and Professor Carrington has reminded us, the "distinction between substantive and procedural law is artificial. In essence there is none." Walter Wheeler Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 336 n.10 (1933) (cited by Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 284 n.25). Far from having a constant meaning, the procedure/substance distinction varies with the purpose it is called on to serve. See Cook, *supra*, at 341–43; Carrington, *supra*, at 287–88.

For purposes of this Article, I have taken a very wide view of procedure, including, for instance, the allocation of burdens of proof, which under other circumstances the Court has denominated substantive. See *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939)). This broad view of procedure is similar to the approach taken by Justice O'Connor in *Waters v. Churchill*, 511 U.S. 661 (1994), where she lists as procedural variations compelled by the First Amendment, alterations in the burden of proof, the quantity of proof, and the standard of appellate review. See *Waters v. Churchill*, 511 U.S. at 669–70.

¹⁷ Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970) (observing that the "courts have lately come to realize that procedural guarantees play an equally large role in protecting freedom of speech" and, in response, have begun to create procedural requirements unique to First Amendment cases); see also Matheson, *supra* note 14, at 237–39 (discussing the Court's use of procedure in libel cases).

To some, any variation of process because of the substantive issue at stake is illegitimate, violative of the trans-substantive principle at the heart of modern civil procedure. The classic article on this issue is Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975). There are other commentaries, both pro and con trans-substantivity. See Phyllis Tropper Braumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C.L. REV. 211 (1992); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV.

Court openly acknowledged that the First Amendment required process to be revised to ensure “the necessary sensitivity to freedom of expression.”¹⁸ However, Monaghan’s hope that these cases represented the beginning of an effort by the courts to “construct a body of procedural law which defines the manner in which they and other bodies must evaluate and resolve [F]irst [A]mendment claims—a [F]irst [A]mendment ‘due process . . . ,’”¹⁹ has not been realized. The Court, far from developing a First Amendment process, has instead produced a conflicting record, where procedural changes are sometimes reviled as illegitimate and, at other times, embraced as unremarkable. No coherent system of procedural safeguards has been developed.²⁰ Libel law, the

1925 (1989); Paul D. Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989); Carrington, *supra* note 16; Geoffrey C. Hazard, Jr., *Discovery Vices and the Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85 (1991); Stephen N. Surbin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

¹⁸ Monaghan, *supra* note 17, at 522 (citing *Freedman v. Maryland*, 380 U.S. 51, 57 (1965)). It is hardly surprising that the author of many of these procedural reforms was Justice Brennan, also the author of the Court’s opinion in *New York Times*. See *id.* at 521 (crediting Justice Brennan with planting many of the seeds from which First Amendment process grew).

¹⁹ *Id.* at 518.

²⁰ See Matheson, *supra* note 14, at 220–21 (arguing that the Court ignored procedural issues in libel cases at first, only focusing on them from 1979 on, and noting that the Court has produced a conflicting series of decisions).

The early cases tended to deal with licensing or other administrative schemes. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965) (viewing the First Amendment as imposing quasi-judicial requirements on the administrative process, and requiring rapid judicial review of any administrative determination); see also, JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 275 (2d ed.) (1996) (noting that “[a]s a general proposition we may say that the First Amendment worries most about legislative and administrative actions, and sees the courts as a beneficent influence But this assumption of judicial beneficence does not always hold true”); Monaghan, *supra* note 17, at 520 (“Central to [F]irst [A]mendment due process is the notion that a judicial rather than administrative, determination of the character of speech is necessary.”). A recent example of this is *Waters v. Churchill*, 511 U.S. 661, 677–78 (1994) (holding that the First Amendment imposed the requirement of an investigation on to the administrative process for disciplining government employees for their speech). Here the First Amendment functions like *Mathews v. Eldridge*, 424 U.S. 319, 332–35 (1976), imposing additional process demands on administrative decisionmaking.

A second line of cases—the ones this Article focuses on—are cases where the judicial process is already deemed appropriate, but the Court must consider whether to alter the

focus of this Article, illustrates the Court's confused approach to First Amendment process.²¹

1. *The Conflicting Case Law*

In libel, the cases can be divided into three categories. The first group consists of those cases in which the Court, usually led by Chief Justice Rehnquist, has denounced any alteration of procedural rules to meet First Amendment concerns. The cases include: *Calder v. Jones*,²² *Keeton v. Hustler Magazine, Inc.*²³—both rejecting any alteration of personal jurisdiction standards to accommodate First Amendment concerns—and *Herbert v. Lando*²⁴—refusing to adopt a privilege that limited discovery of the thought

judicial process to make it more protective of First Amendment concerns. For example, should the rules on pleading, discovery, or jurisdiction be altered to make the legal system more protective of free speech rights.

²¹ Specifically, this Article looks at cases where the Court has altered or refused to alter the procedural rules to make recovery easier or harder for libel plaintiffs. It does not examine cases where the press challenges a procedural protection because it wishes to publish or gain access to a judicial proceeding. Such challenges range from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558 (1980) (seeking access to criminal trial) to *Craig v. Harvey*, 331 U.S. 367, 368 (1947) (restricting use of judicial contempt power when applied to the press). One case that seems to partake of both categories is *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984). Here the Court held that a newspaper could be barred from publishing information it obtained as part of discovery in a libel suit. *See id.* at 37. In one sense, this case illustrates that the discovery rules will be applied without regard to the First Amendment claim at issue. Yet, the proposed process change (exempting the press from protective orders) was not a process variation designed to affect the outcome of the libel case. In fact, the press could have raised the issue in any case. For this reason, although it is referenced in the footnotes, this case does not form part of the underlying analysis of the Court's willingness to grant procedural protections to aid libel defendants.

²² 465 U.S. 783 (1984) (entertainer Shirley Jones sued the National Enquirer, its editor and its reporter in state court in California. The editor and reporter challenged the exercise of jurisdiction asserting that they lived and worked in Florida. The Supreme Court upheld the exercise of jurisdiction).

²³ 465 U.S. 770 (1984) (Kathy Keeton sued Hustler magazine for libel in New Hampshire, the only state in which the action was not time-barred. The Supreme Court upheld the exercise of jurisdiction despite the fact that the suits' only connection with New Hampshire was the sale of 10 to 15,000 copies of Hustler in that state).

²⁴ 441 U.S. 153 (1979) (retired army officer—a public figure—claimed a television network and magazine defamed him by falsely and maliciously portraying him as a liar and a person who accused his superior officers of covering reports of war crimes as a way of explaining his relief from military command). The Court refused to adopt a privilege limiting discovery of the thought process or conversations of reporters and editors when sought by a libel plaintiff to prove actual malice. *See id.* at 158–77. The Court took the same stance in

processes or conversations of reporters and editors when sought by a libel plaintiff to prove actual malice.²⁵ The strongest language in this line of cases²⁶—the “no-accommodation” cases as I will call them—is found in Chief Justice Rehnquist’s opinion in *Calder*: “We have already declined in other contexts to grant special procedural protections to defendants in libel and

Branzburg v. Hayes, 408 U.S. 665 (1972), when it rejected a claim of a constitutionally mandated testimonial privilege for news reporters. Although *Branzburg* was a criminal case, its logic applies to civil cases. Presumably, in libel suits a reporter may not claim a constitutional privilege when questioned about a confidential source during discovery, unless of course there is a state law privilege. *Accord Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (holding that a public figure plaintiff was not relieved of the burden of proving actual malice where the state shield law allowed the reporter to refuse to divulge the confidential sources of the article, but not reaching the issue of the possible scope of such laws).

The Court also refused to alter discovery standards in *Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984), discussed in *supra* note 21, when it rejected a claim that the First Amendment required a variation of Rule 26’s standard for protective orders.

²⁵ It is possible to read *Herbert v. Lando* as willing to adopt some deviation from the procedural norms to protect free speech interests. While the Court refused to adopt the privilege sought by the defendant media, at least in the eyes of concurring Justice Powell, it did not reject the need to accommodate First Amendment concerns when deciding what discovery should be permitted. *Herbert*, 441 U.S. at 177–78 (Powell, J., concurring) (Justice Powell noted that “I do not see my observations as being inconsistent with the Court’s opinion; rather, I write to emphasize the additional point that, in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interest of the plaintiff.”); *see also Matheson, supra* note 14, at 256 (opining that “[n]o Justice [in *Herbert v. Lando*] disputed that [the] courts should supervise discovery procedure to accommodate [F]irst [A]mendment concerns . . .”).

²⁶ There are two other issues on which the Court seems to have taken a no-accommodation stance: punitive damages and Rule 15’s relation back provisions. First, on punitive damages, the Court denied certiorari when asked to create a due process protection for newspapers against excessive punitive damages. *See Disalle v. P.G. Publishing Co.*, 544 A.2d 1345 (Pa. 1988). The Court later adopted such limitations in all cases. *See, e.g., BMW v. Gore*, 116 S. Ct. 1589 (1996).

A second possible example of a refusal to create any special process in First Amendment cases is *Schiavone* which interpreted then Rule 15(c)’s relation back provisions, as applied to a media defendant in a libel case. Although the Court ruled for the press, it did not suggest that this result was triggered by the First Amendment, but rather by a plain reading of the then existing language of the rule. *See Schiavone v. Fortune*, 477 U.S. 21, 30 (1986). The *Schiavone* Court could thus be read as implicitly rejecting any special First Amendment procedure in this area. *Accord Matheson, supra* note 14, at 233 n.90 (arguing that a procedural deviation in such an area would be improper).

defamation actions in addition to the constitutional protections embodied in the substantive laws.”²⁷

The message is short and, to First Amendment ears, not so sweet: there will be no alteration of procedural rules to accommodate First Amendment concerns. According to these cases, there is no First Amendment process.

In contrast, in a second line of cases, the Court has repeatedly held that the First Amendment requires special procedures. In *Waters v. Churchill*, Justice O'Connor, citing to a long list of libel cases, notes that the Court has “often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech.”²⁸ In libel cases the Court has imposed the following procedural requirements: A heightened level of proof (public persons must present clear and convincing evidence of actual malice);²⁹ a shift in burden of proof (the

²⁷ *Calder*, 465 U.S. at 790–91. For criticism of Chief Justice Rehnquist’s opinions in *Calder* and *Keeton* see Matheson, *supra* note 14, at 257–71.

²⁸ *Waters v. Churchill*, 511 U.S. 661, 669–70 (1994) (*Waters* is not a libel case, but rather concerns the free speech rights of government employees).

²⁹ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964) (requiring public officials to present clear and convincing evidence of actual malice); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967) (extending the requirement to public figures). In addition, the clear and convincing standard may apply to other elements of a plaintiff’s case. For instance, the plaintiff may have to show clear and convincing evidence that the alleged libel refers to her in some recognizable way (the “of and concerning” requirement), and perhaps, falsity, and the standard may even apply to private figures. See *Hepps*, 475 U.S. at 779 n.4 (refusing to address what quantity of proof of falsity a private figure plaintiff must present); *Herbert*, 441 U.S. at 199 (Stewart, J., dissenting) (arguing that the clear and convincing standard applies to virtually all elements of plaintiff’s case); see also Matheson, *supra* note 14, at 244 (noting that the Court has not yet resolved what issues, in addition to actual malice, the plaintiff must prove by clear and convincing evidence).

Moreover, although the clear and convincing standard is technically limited to public figure plaintiffs, most private figure plaintiffs elect to seek either presumed or punitive damages, thus triggering the requirement that they too produce clear and convincing evidence of actual malice. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that “the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury”). In practice, the clear and convincing standard is applied in the vast majority of law suits. See Anderson, *supra* note 14, at 502–03 (1991) (noting that “[i]n practice, few suits proceed under the negligence standard, because plaintiffs rarely sue for actual injury only. . . . Thus, the full panoply of constitutional rules developed for public plaintiff cases controls the great majority of libel cases, including those brought by private plaintiffs”).

burden of proof of falsity and fault has been shifted to public figure and public official plaintiffs and to private figure plaintiffs in public issue cases);³⁰ an independent appellate review of factual findings on actual malice.³¹

Sometimes the Court is explicit—it acknowledges that the First Amendment is the source of a procedural variation. Typical of these cases is *Bose*, where Justice Stevens, without even mentioning the “no- accommodation” cases decided that same term,³² cited to the First Amendment as requiring special appellate procedures in libel cases: “The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law.”³³

In other cases, the Court is less explicit—it grants a unique procedural variation only to libel defendants, but does not openly acknowledge that a

³⁰ See *New York Times*, 376 U.S. at 279–80 (holding that the public official plaintiff must prove falsity and actual malice); *Gertz*, 418 U.S. at 347 (requiring private figure plaintiffs to prove some level of fault to recover, at least where speech is on a matter of public concern); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775, 777 (1986) (holding that plaintiffs in both public and private figure cases concerning matters of public concern bear the burden of proof of falsity).

³¹ See *New York Times*, 376 U.S. at 285.

This Court’s duty is not limited to the elaboration of constitutional principle; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across ‘the line between speech unconditionally guaranteed and speech which may legitimately be regulated.’ In cases where that line must be drawn, the rule is that we ‘examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.’ We must ‘make an independent examination of the whole record,’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id. (citations omitted); see also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). For a discussion of the scope and meaning of independent review see *infra* notes 70–73 and accompanying text.

³² *Bose* was decided April 30, 1984. Both *Calder* and *Keeton* were decided only a few weeks earlier on March 20, 1984.

³³ *Bose*, 466 U.S. at 510. In *Bose*, respondent published an article in its magazine *Consumer Reports* evaluating the quality of numerous brands of loudspeaker systems, including one marketed by petitioner Bose. Bose sued for product disparagement because the review described its speakers as causing individual instruments to grow to “gigantic proportions” and “wander about the room.” See *id.* at 487–89; see also, *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (majority of the justices “agree that some procedural requirements are mandated by the First Amendment . . .”).

distinct First Amendment procedure has been created.³⁴ But in all these cases, whether implicitly or explicitly, heightened procedural protection is treated, not as heresy, but as an established part of First Amendment doctrine.

In the third group of cases, the Court typically purports to be applying a general rule of procedure without any deviation due to First Amendment concerns, but an analysis of the case law strongly suggests that free speech concerns in fact influenced these decisions.³⁵ The principal illustration of this line of cases is the Court's ruling in *Anderson v. Liberty Lobby, Inc.*³⁶ on the standard for summary judgment. In *Anderson* the Court announced as a general rule: (1) that the standard of proof applicable at trial would also be applied at the summary judgment stage;³⁷ and (2) that issues of state of mind could be resolved on summary judgment.³⁸ The opinions show that the Court itself was divided as to whether it was deciding the case as a matter of special First

³⁴ An illustration is *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). In *Hepps*, the Court switched the burden of proof of falsity from the defendant to the plaintiff. *Id.* at 777. Neither the majority nor the dissent in *Hepps* characterized this as an issue of First Amendment procedure, yet six years later in *Waters*, Justice O'Connor, the author of both *Hepps* and *Waters*, acknowledged that *Hepps* was a First Amendment process case. *See Waters*, 511 U.S. at 669.

³⁵ These cases are distinguishable from those discussed above where the Court grants a First Amendment process right, but does so implicitly. In the implicit grant cases, while the Court does not openly acknowledge that it is creating a unique First Amendment process right, it does create that process right only in libel cases. In contrast, in the third group of cases the process rule is applied to all cases—whether founded in libel, wrongful death, contract, etc.—but analysis reveals that this new “general” process rule is especially beneficial in libel cases.

³⁶ 477 U.S. 242 (1986). In *Anderson*, respondents, a nonprofit corporation described as a “citizen’s lobby,” and its founder, filed a libel action against petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. *See id.* at 244–45.

Another case which could arguably fit into the category of cases purporting to establish a general rule of procedure but in fact favoring free speech interests is *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). In *Bose*, the Court, while admitting that it was adopting a requirement of independent appellate review dictated by the First Amendment, also made a valiant, but ultimately unconvincing, effort to argue that this procedural accommodation was not in conflict with Appellate Rule 52 which dictates a clearly erroneous standard of review. *Id.* at 499 (arguing that the conflict is “more apparent than real”); *see also Matheson*, *supra* note 14, at 277–78 (discussing *Bose*).

³⁷ *Anderson*, 477 U.S. at 252 (“[W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.”).

³⁸ *Id.* at 256 n.7 (clarifying the dicta in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979)).

Amendment process.³⁹ The majority repeatedly stated that they were creating a general rule not limited to First Amendment cases, and even cited with approval Justice Rehnquist's "[no] special procedur[e]" admonition in *Calder*.⁴⁰ Justice Brennan, in dissent, agreed that this was not a First Amendment case, but rather concerned the standard for summary judgment in all cases.⁴¹ However, then-Justice Rehnquist's dissent accused the majority of *sub silentio* creating yet another First Amendment procedural right.⁴²

Even if we take the majority at their word—that *Anderson* was not intended to create First Amendment process—the impact of the case on First Amendment law is so profound that it seems hard to imagine that the Court did not recognize the degree of protection which its "general" announcement gave to defendants in libel cases. First, defendants in libel cases depend on summary judgment to quickly and (relatively) cheaply dispose of most libel cases. Thus any ruling which makes summary judgment easier for defendants to obtain is a significant victory for the press.⁴³ Second, the Court's announcement that the

³⁹ The question of whether the rule is a constitutional one or simply an interpretation of Rule 56 makes little difference in practice where the case is in federal court, since the lower federal courts are bound by either. However, in state court the difference is profound, while state courts must comply with constitutional process, they need not pay any attention to the federal rules of civil procedure. *Accord* LDRC Bulletin, Summary Judgment Update Part II, Summary Judgment Motions in Defamation Actions: 1986–1994 (Issue No. 3, July 31, 1995) at 7, 23 [hereinafter LDRC SJ Update] (noting that *Anderson* has created some confusion as to whether it is a constitutional standard binding on state courts).

⁴⁰ The Court in footnote 7 repeats with apparent approval, Justice Rehnquist's assertion in *Calder* that special procedural protection for libel defendants is disfavored. *See Anderson*, 477 U.S. at 256 n.7 (citing *Calder*, 465 U.S. at 790–91, which reports [the Court's] "general reluctance" to grant First Amendment procedural protections).

⁴¹ *See id.* at 257 n.1 (Brennan, J., dissenting) (opining that the Court's ruling is not a First Amendment holding but "changes [the result] for *all* litigants, regardless of the substantive nature of the underlying litigation").

⁴² *See id.* at 268–69 (Rehnquist, J., dissenting).

⁴³ *See infra* notes 74–76, discussing statistical studies of summary judgment in libel cases. The Court in *Anderson* noted that the lower court was skeptical that the higher standard would produce any difference in results in most cases, but countered that "it could not say that it would never do so." *Anderson*, 477 U.S. at 254. The dissents of both Justice Brennan, *see id.* at 267, and then-Justice Rehnquist, *see id.* at 269, argued that the decision would have little practical effect. However, a recent report analyzing defense motions for summary judgment in libel and related cases against the media from 1980 to 1994 concluded that "in cases in which the court cited [*Anderson v. Liberty Lobby, Inc.* for the requirement that the plaintiff establish clear and convincing evidence of actual malice at the summary judgment stage, defendants were far more successful than overall, prevailing on 96.6% of trial court motions (63 out of 65 motions) and 88.7% of appeals (47 out of 53 appeals)." LDRC SJ Update, *supra* note 39, at 2.

trial burden of proof would apply at the summary judgment stage is particularly advantageous in libel cases because (unlike the majority of civil suits where a “preponderance of the evidence” standard applies) this requires most libel plaintiffs to produce “clear and convincing” evidence to avoid summary judgment.⁴⁴ Third, the Court’s announcement in *Anderson* that an issue of state of mind will not prevent summary judgment, while also articulated as a general rule, has a far greater impact in a libel case than in a non-First Amendment case, since actual malice—one of the major bases on which defendants move for summary judgment—is an issue of the state of mind of the reporter/publisher.⁴⁵ In sum, while the majority’s language in *Anderson* would justify its categorization as a “no-accommodation” case, an analysis of its impact indicates that the Court was influenced by the First Amendment issues at stake, and adopted a procedure highly protective of that interest.⁴⁶

Thus, even though procedural accommodations have existed since *New York Times*, the case law shows that the Court lacks any consistent approach to

⁴⁴ The Court repeatedly noted that its rule would impose a clear and convincing standard in libel cases. *See, e.g., Anderson*, 477 U.S. at 252, 254, 255. This applies to most libel suits. *See supra* note 29 and accompanying text.

⁴⁵ In 1979 in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), Chief Justice Burger suggested that summary judgment for lack of actual malice was not appropriate because the defendant’s state of mind was at issue. *See id.* at 120 n.9 (“The proof of ‘actual malice’ calls a defendant’s state of mind into question and does not readily lend itself to summary disposition.” (citation omitted)). This dicta was widely criticized by the media and scholars, and when *Anderson* played down the implications of *Hutchinson* and indicated that summary judgment was appropriate on actual malice issues, it adopted a rule long lobbied for and especially beneficial to libel defendants. *See Anderson*, 477 U.S. at 256 n.7.

⁴⁶ An opposite reading of the case—that it announced a general rule uninfluenced by the First Amendment—has some support. First, *Anderson* was one of three cases announced during the same term which sought to fundamentally reshape Rule 56—thus giving support to the view that *Anderson* is part of a general reformulation of summary judgment standards. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); accord Jack H. Freidenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 771 (1988) (treating the three decisions as part of a coordinated effort by the Court to provide a logical frame work for deciding how and when summary judgment should be granted). Second, the Court in footnote 7 repeats with apparent approval then-Justice Rehnquist’s assertion in *Calder* that special procedural protection of libel defendants is disfavored. *See Anderson*, 477 U.S. at 256 n.7 (citing *Calder*, 465 U.S. at 790–91, which reports the Court’s “general reluctance” to grant First Amendment procedural protections). This comment may however simply be a response to then-Justice Rehnquist’s dissent which takes the majority to task for creating a special First Amendment procedure. *See id.* at 268–69 (Rehnquist, J., dissenting). Third, Justice Brennan’s dissent indicates that he at least viewed the case as about summary judgment not First Amendment issues. *See id.* at 257 n.1.

the question of when, or even whether, procedural accommodations are appropriate.

2. *A Lack of Rationale*

The case law not only reveals a conflict of results, but a surprising lack of explanation as to when procedural protections will be granted or denied. Since *New York Times*, it has been clear that the aim of First Amendment process is to minimize the chill on speakers (a concept discussed more fully *infra*), but the Court has never detailed a test for determining when procedural accommodations should be granted in libel cases.⁴⁷ It says yes or no without

⁴⁷ See also Matheson, *supra* note 14, at 221 (opining that “[u]nfortunately, the Court has not defined adequate guidelines to explain when and how courts should further substantive values by deviating from procedures commonly applied to all types of cases”).

If we study the language of the Court’s opinions, the only theme that runs consistently through the cases is a claim that the Court is being loyal to the precedent of *New York Times*. Whether the Court is granting or denying procedural protections, it consistently cites to *New York Times*. For instance, when holding that no special protections are warranted against assertions of personal jurisdiction in *Calder*, Justice Rehnquist expressly argues that to do so would go beyond *New York Times*. See *Calder*, 465 U.S. at 790–91. Likewise, Justice Scalia, noting that the Court has “been most circumspect about acknowledging procedural components of the First Amendment,” contends that such procedural accommodations are simply “elaborations upon the limitation on defamation suits first announced in *New York Times Co. v. Sullivan*.” *Waters v. Churchill*, 511 U.S. 661, 686–87 (1994).

In the cases where the Court has approved procedural accommodations, the Court has also been careful to note the origins of such a process in *New York Times*. Thus, both Justice O’Connor in *Hepps* and Justice Stevens in *Bose* expressly argue that the procedural protections they are recognizing can be traced to *New York Times*. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771–76, 778 (1986); *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508–11, 514 (1984).

The Court has not only repeatedly cited to *New York Times*, but an overview of the cases’ results lends some support to the thesis that the Court (even though not acknowledging that this is its goal) may be trying to limit process accommodations to those originally granted in *New York Times*. *New York Times* guaranteed independent review of constitutional facts. The Court continued this in *Bose*, 466 U.S. at 510, and in *Harte-Hanks Communications, Inc. v. Connaughton*, 191 U.S. 657, 688–89 (1989). *New York Times* shifted the burden of proof on falsity and fault, and the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), and *Hepps*, 475 U.S. at 775, has applied this shift in burden to private figures. *New York Times* imposed a clear and convincing standard for proof of actual malice, and the Court has remained steadfast to this commitment, see *Gertz*, 418 U.S. at 342, although it has prevaricated on whether to extend such protection to proof of falsity, see *Hepps*, 475 U.S. at 779 n.4.

The Court’s no-accommodation cases can also be viewed as an attempt to adhere to *New York Times*. *New York Times* never said there was any special procedural protection on questions of personal jurisdiction, see *New York Times*, 376 U.S. at 255 n.25–26 (refusing to

much explanation. In fact, even when the Court creates a heightened procedural protection in a First Amendment case, the Court often denies that such an accommodation is being made,⁴⁸ or is otherwise less than forthright about its action.⁴⁹ This lack of rationale was openly acknowledged by Justice O'Connor in *Waters v. Churchill*, a case focusing on the free speech rights of government

consider the defense's challenge to personal jurisdiction on grounds of mootness), or on discovery issues; and, to date, the Court has refused to adopt such procedural rights. See *Calder*, 465 U.S. at 790-91 (personal jurisdiction); *Herbert*, 441 U.S. at 176-77 (discovery). Thus, the cases can be portrayed as a simple adherence to the precise guarantees of *New York Times*.

However, the argument that *New York Times* explains the Court's process decisions faces two problems. First, the Court's adoption of procedural innovations in the summary judgment case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), does not seem to conform to this explanation. *New York Times* did not suggest that any alteration in the summary judgment standard was appropriate. Second, it is questionable if either the personal jurisdiction or the discovery cases can be explained as outgrowths of *New York Times*. Those protections were not granted in *New York Times* because they were not considered by the Court. Thus, it cannot be regarded as even persuasive precedent on either issue.

Furthermore, the main problem with using *New York Times* as the key to the Court's conflicting First Amendment process cases is the Court's inability to decide what that case stands for. Both the dissent and the majority repeatedly claim that *New York Times* is on their side. Thus, while the Court may be united in its feeling that *New York Times* contains the answer as to when process should be created, the Court cannot agree on what that answer is. An illustrative case is *Herbert*, where Justice White, writing for the majority, supported his refusal to create an evidentiary privilege by citing to *New York Times* and its progeny and asserted that "these cases [do not] suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence." *Herbert*, 441 U.S. at 160. In dissent, Justice Marshall argued that First Amendment restrictions on discovery should be recognized and that the majority misreads *New York Times*: "[a]lthough professing to maintain the accommodation of interest struck in *New York Times Co. v. Sullivan*, [the majority] is unresponsive to the constitutional considerations underlying that opinion." *Id.* at 202 (citation omitted). Thus, the one thread of consistency in the Court's decisions, and the closest it comes to a general rationale, is a repeated citation to *New York Times*, even though the Court is unable to decide what that case means in any particular application. I suggest in Part III that the Court's repeated reliance on *New York Times* is a reflection of its unacknowledged focus on accuracy as the main value underlying First Amendment process.

⁴⁸ See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), discussed in notes 40-41 *supra*, where the majority denied that they were creating any special First Amendment protection.

⁴⁹ See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), discussed *supra* note 34. The Court has been equally tight lipped when it denies requested procedural protection. Then-Justice Rehnquist's repeated statement that the Court has previously rejected "special procedural protections" tends to distort the case law by denying the procedural accommodations that have been granted, and is devoid of an explanation as to why no protections are warranted. See, e.g., *Calder*, 465 U.S. at 790-91; see also Matheson, *supra* note 14, at 268 (criticizing Justice Rehnquist's opinion as being founded in "half truths").

employees.⁵⁰ Justice O'Connor admitted that although a majority of the Court "agree[s] that some procedural requirements are mandated by the First Amendment, and some are not[,] [n]one of us have discovered a general principle to determine where the line is to be drawn."⁵¹ Instead, she suggested the Court "reconcile [itself] to answering the question on a case-by-case basis, at least until some workable general rule emerges."⁵² As I will suggest in Part III, the goals of a First Amendment process should be speed, efficiency, and accuracy. Further, I will argue that the Court's decisions seem to have promoted only one of these goals—accuracy. At this point it is sufficient to note that the Court's decisions are in conflict and that the Court has offered no general rationale to explain when it will grant a procedural variation to promote free speech.

B. *An Ineffective Process?*

The Court's decisions on First Amendment process can be criticized not only for their lack of doctrinal coherence, but also for their failure to effectively protect free speech interests. To assess effectiveness, we must start by reviewing the procedural path of a typical libel suit,⁵³ as modified by the Supreme Court.

1. *The Procedural Path of a Libel Suit*

The first stage in a libel lawsuit is pleading. The Court has never been asked to grant, nor has it ever suggested that there may be, any constitutional

⁵⁰ See *Waters v. Churchill*, 511 U.S. 661 (1994). Writing for four justices, Justice O'Connor recognized that a government employee engaged in speech had a process right which required the government to investigate with "the care that a reasonable manager would use before making an employment decision." *Id.* at 677-78 (citation omitted).

⁵¹ *Id.* at 671.

⁵² *Id.*

⁵³ Some procedural protections apply to all public issue libel cases (e.g., the switched burdens of proof of fault and falsity). Other protections (for instance, the clear and convincing standard and appellate review) *may* only apply to cases where actual malice is at issue. See *supra* notes 29-31 and *infra* notes 70-73 (discussing the confusion as to the breadth of these procedural protections). These "actual malice triggered" protections always apply to public person cases. However, as at least one author has noted, most private plaintiffs seek presumed or punitive damages, thus they also trigger the actual malice standard and all the related procedural protections. See Anderson, *supra* note 14, at 502; *supra* note 29. Thus, the "typical" libel plaintiff has to prove actual malice and enjoys all the procedural protections created by the Court. This section discusses such a plaintiff.

process guarantees that affect the pleading stage of a libel suit.⁵⁴ While some states require a libel plaintiff to plead the actual words of the alleged defamation, there is no such constitutional requirement.⁵⁵ The states are free to fashion the pleading rules as they wish. They can require a plaintiff to provide lots of details or simply require general notice of the libel claim. The Court has also rejected the idea that special protection should be granted when the media challenges a plaintiff's suit for lack of personal jurisdiction.⁵⁶ Thus, at the front end of a law suit no First Amendment procedural protections have been granted.

The next stage is discovery. In libel suits, discovery typically focuses on three main topics: the truth of the alleged libel (unless falsity is conceded); the fault of the newspaper (whether under a negligence or actual malice standard); and the damages claimed by the plaintiff. Discovery can take from months to years and is expensive.⁵⁷ The discovery almost always requires extensive court intervention to resolve motions to compel and requests for protective orders.⁵⁸

⁵⁴ At least one lower federal court has suggested that specificity in pleading in First Amendment cases is constitutionally required. See *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076, 1084-85 (9th Cir. 1976); accord, *Bargen v. Playboy Enters., Inc.*, 564 F. Supp. 1154, 1154 (1983) (citing *Franchise Realty*). Another federal court has suggested that such a requirement is favored as a matter of federal policy. See *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698-99 (8th Cir. 1979); *Pinto v. International Set, Inc.*, 650 F. Supp. 306, 309 (D. Minn. 1986); *Provisional Gov't of New Afrika v. A.B.C.*, 609 F. Supp. 104, 108 (D.D.C. 1985). However, the Supreme Court has never addressed pleading requirements in libel cases. It did recently reject a trend to impose heightened pleading rules in § 1983 cases. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

Of course any time the Court changes the substantive law of libel, it necessarily impacts pleading. For instance, when the Court held that fault was a required element in every libel case, even in notice pleading states, the plaintiff must now plead that the defendant acted with negligence or actual malice.

⁵⁵ Some states as a matter of state law require the actual words of the alleged defamation to be specifically pleaded. See *infra* note 180. In addition, some states have retraction statutes which may require plaintiffs to request a retraction before filing and may also impose special pleading requirements. See *id.* There is no such constitutional retraction requirement, although it has formed an element of many proposed statutory reforms of libel. See, e.g., Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, reprinted in *REFORMING LIBEL LAW* 229 (J. Soloski & R. Bezanson eds., 1992).

⁵⁶ See *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Such motions typically occur at the outset of a law suit.

⁵⁷ See *infra* notes 94-95 and accompanying text.

⁵⁸ Both the defendant media and the plaintiff can prove reluctant to produce requested information. See, e.g., James H. Hulme & Steven M. Sprenger, *Vindication Reputation: An Alternative to Damages as a Remedy for Defamation*, reprinted in *REFORMING LIBEL LAW*

Despite the enormous importance of discovery to the law suit, this step is also devoid of constitutional protections. In *Herbert v. Lando*, the Court rejected a claim that the work of editors and journalists should be exempt from discovery, or even subject to a heightened showing before discovery was allowed.⁵⁹

The next stage in any libel suit is almost always a defense motion for summary judgment. In the vast majority of libel cases, either during or at the end of discovery, the defendant moves for summary judgment, usually on a variety of grounds: privilege, lack of proof of falsity, opinion, and almost always, lack of proof of actual malice.⁶⁰ Here, for all practical purposes, the Court has granted a procedural variation to protect First Amendment values, because in *Anderson* it emphasized that summary judgment was appropriate on the issue of actual malice, and that to survive a defense motion a plaintiff must produce clear and convincing evidence of malice.⁶¹

In addition, all the alterations of burdens of proof (switching the burden of fault and falsity to the plaintiff) have aided defense requests for summary judgment.⁶² Now, to win summary judgment, the defendant need not disprove fault or falsity but may simply point to a plaintiff's inability to prove either.⁶³ If

162 n.134 (John Soloski & Randall Bezanson eds., 1992) (noting that in *Westmorland*, there were three plaintiff's motions to compel).

⁵⁹ See *Herbert v. Lando*, 441 U.S. 153, 175 (1979). But see *id.* at 180 (Powell, J., concurring) (arguing that even when applying general discovery rules, the trial courts "must ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance"); see also *supra* note 25.

⁶⁰ For a discussion of the grounds on which defendants move for summary judgment, see LDRC SJ Update, *supra* note 39, at 18-22 (recording the basis and success rate of motions for summary judgment from 1990-1994) which is discussed more fully *infra* note 74; see also PLI, *Libel Litigation 1992*, at 137-203; DONALD M. GILLMOR, POWER, PUBLICITY AND THE ABUSE OF LIBEL LAW 138-40 (1992) [hereinafter GILLMOR, POWER] (discussing success rates for motions based on actual malice, negligence, truth, and opinion).

⁶¹ See *supra* notes 36-46 and accompanying text (discussing the impact of *Anderson* in libel cases).

⁶² See *supra* note 30 and accompanying text (on burden shifts).

⁶³ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1982); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23, 325 (1982) (holding that a defendant moving for summary judgment need not produce any evidence to disprove an element of the plaintiff's case, but need only point out to the court the absence of evidence to support the nonmoving party's (plaintiff's) case). Rule 56 "mandates" the entry of judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to

the plaintiff cannot come forward with clear and convincing evidence of fault and falsity, the suit is dismissed.⁶⁴ Summary judgment then is the site of the first set of procedural accommodations granted to libel defendants.

Presuming the case survives summary judgment, it will go to trial.⁶⁵ The Court has constitutionally mandated certain procedural protections at the trial stage. Once again, the burden of proving both fault and falsity has been shifted to the plaintiff and the level of proof on certain issues has been raised to a clear and convincing standard.⁶⁶ Instructions to the jury inform them of these heightened proof requirements. Equally, defendants who move the trial court for a directed verdict, JNOV, and new trial also benefit from the shifted burdens of proof and the clear and convincing standard.⁶⁷ Thus, the trial stage carries considerable procedural breaks for the typical libel defendant.

But it is post trial that First Amendment procedure begins to dominate. Almost all libel trial verdicts are appealed.⁶⁸ If the plaintiff prevails, an appeal usually triggers the *Bose* requirement that the appellate court independently

make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 322-23.

⁶⁴ See *id.* As discussed *supra* in notes 29 and 53, although technically only applying to public plaintiff's proof of actual malice, the necessity of recovering punitive damages force even private plaintiffs to meet the clear and convincing proof of the actual malice standard.

⁶⁵ The number of trials in libel and related cases against the media in 1996 was 14. This compares with a low in 1995 of 8 trials. Libel Defense Resource Center, Damages Survey, LDRC Bulletin No. 1 (Jan. 1997), at 1, 4 [hereinafter LDRC 1996 Damages]. Previous years saw the following numbers: 1994 had 17 trials; 1993 had 26; 1992 had 13; 1991 had 25; and 1990 had 19. The average number of trials per year in the 1990s is 17.4, compared with just under 25 per year for the decade of the 1980s. The LDRC actually tracks libel and "related" cases (including, for instance, privacy cases). Thus, the number of solely libel cases may be lower. However, because the report focuses only on suits against the "media," the actual numbers of libel suits may be higher. See *id.* at 1 (describing the scope of the report).

⁶⁶ See *supra* notes 29-30 (discussing the shift in the burden of proof and the "clear and convincing" requirement).

⁶⁷ See *Anderson*, 477 U.S. at 254 (clear and convincing applies to directed verdict motions).

⁶⁸ See GILLMOR, POWER, *supra* note 60, at 137. Of 122 jury verdicts for plaintiffs and defendants, 111 were appealed at least one level, 28 were appealed another level, and 2 were appealed a third time. See *id.* As percentages, this shows that almost 91% of all libel jury verdicts were appealed, 22.9% of them through at least two levels of appeal. If we look only at defense appeals of plaintiffs' verdicts, Gillmor reports that of the 122 cases in his study which went to trial, plaintiffs won 90, of which 86 were appealed (i.e., 95.5% of plaintiffs' trial verdicts were appealed). See *id.*

The LDRC studies report a decrease in the number of cases appealed (rather than settled or not appealed) in the 1990s compared to the 1980s. In the 1980s only 6.65% of plaintiffs' verdicts were paid without appeal, versus 16.7% so far in the 1990s. See LDRC 1996 Damages, *supra* note 65, at 3, 8.

assess the record for clear and convincing evidence of actual malice.⁶⁹ This heightened standard of judicial review is triggered in each successive appeal. The exact stringency of *Bose* is not clear: it may require an independent review only of actual malice; it may also apply to findings of falsity, negligence, the opinion/fact distinction, "of and concerning the plaintiff," and even defamatory content;⁷⁰ it may mandate *de novo* review; it may require deference to the

⁶⁹ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964); *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984).

⁷⁰ The Court in *Bose* applied the independent review standard to a finding of actual malice, as the Court did in *New York Times*. See *supra* notes 10, 33, and accompanying text. In addition, the Court in *New York Times* arguably applied independent appellate review to "of and concerning." See 376 U.S. at 288.

However, the language in *Bose* implied that independent review might be required any time a question of First Amendment protection was at stake. See, e.g., *Bose*, 466 U.S. at 505 (noting that the Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited"). Since the requirement that plaintiffs prove negligence, falsity, defamatory meaning, and "of and concerning" are all constitutionally mandated, it is arguable that these too require independent scrutiny. The lower courts are divided on these issues: on application to falsity, see, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987); *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (Mich. 1991); *Deaver v. Hinel*, 391 N.W.2d 128 (Neb. 1986); on application to negligence, see, e.g., *Levine v. CMP Publications*, 738 F.2d 660 (5th Cir. 1984); *Miami Herald Publ'g Co. v. Ane*, 458 So. 2d 239 (Fla. 1984); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476 (Minn. 1985); *Landsdowne v. Beacon Journal Publications Co.*, 512 N.E.2d 979 (Ohio 1987); *Gazette, Inc. v. Harris*, 325 S.E.2d 713 (Va. 1985); on "of and concerning," see, e.g., *Deaver v. Hinel*, 391 N.W.2d 128 (Neb. 1986); on defamatory meaning, see *Dodson v. Dicker*, 812 S.W.2d 97 (Ark. 1991); *Dixon v. Ogden Newspapers, Inc.*, 416 S.E.2d 237 (W. Va. 1992); and on award size, see *Fleming v. Bedford*, 325 S.E.2d 713 (Va. 1985).

Several courts have applied the independent review standard outside of the libel area. See, e.g., *Hurley v. Irish-American Gay and Lesbian Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (applying independent appellate review to the question of whether petitioner's activity was protected speech; *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 265, *cert. granted, judgment vacated*, 116 S.Ct. 2519 (1996) (*Bose* applied to factual findings on status of homosexuals); *Brown v. Palmer*, 915 F.2d 1435, 1441 (10th Cir. 1990) (applying independent review to the issue of whether a location was a public forum); *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (applying independent review to commercial speech issues); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107-08 (5th Cir. 1987) (applying independent review to commercial speech issues); *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1986) (applying independent review to the constitutionality of a statute restricting speech in a public forum); *Brasslett v. Cota*, 761 F.2d 827, 839-40 (1985) (applying independent review to a government employee speech case; cf. *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1228-29 (7th Cir. 1985) (refusing to apply independent review

jury's factual findings (especially on credibility);⁷¹ it may apply to appeals by both parties or only to defense appeals;⁷² and finally it may apply only to

to an appeal of a transit authority's refusal to rent advertising space); *see also*, Robert E. Keeton, *Federal Influences on the Treatment of Law and Fact in Tort Litigation*, 55 MD. L. REV. 1344, 1346-53 (1996) (discussing the use of independent review). Indeed, in *Bose*, the Supreme Court cited its prior decisions on fighting words, incitement to riot, obscenity, and child pornography as illustrative of cases where the Court had a constitutional responsibility to exercise independent review. *See Bose*, 466 U.S. at 503-08. Moreover, in *New York Times* itself, the origin of independent review in libel cases, Justice Brennan implied that the requirement already existed for certain types of speech such as obscenity. *See New York Times*, 376 U.S. at 284-85.

For an extensive review of the lower courts' readings of *Bose*, see Libel Defense Research Center, *Ten Years of Appellate Review in Defamation Cases from Bose to Connaughton to the Present*, LDRC Bulletin No. 2 (Apr. 1994) [hereinafter LDRC, *Ten Years of Appellate Review*]; Alice N. Lucan et al., *Defining Appellate Review: Bose's Problems and Opportunities*, in LIBEL LITIGATION 1988, 311 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 252, 1988); Anderson, *supra* note 14, at 495-98.

⁷¹ The Court's language in *Bose* was again confused. At points it referred to the standard of review as "*de novo* review" requiring "an independent examination of the entire record." *Bose*, 466 U.S. at 499, 508 n.27. At other times, the *Bose* Court suggested deference to the fact finder was required, especially on issues of credibility, and that the review was not *de novo*. *See id.* at 499-500, 514 n.31. The Court provided some limited clarification in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). The *Connaughton* Court implied that even with independent review, the appellate court must take as given facts which were undisputed and those which the jury "must have" found. *Id.* at 690-91. It also rejected the idea that reviewing courts should reassess credibility, holding that such jury findings were only subject to a clearly erroneous standard of review. *See id.* at 688. However, the Court continued to repeat that independent review required a consideration of "the factual record in full" and included an examination of "the statements at issue and the circumstances under which they were made." *Id.* at 688. As one commentator has observed "whatever the Court means by 'independent review,' there is no doubt that it invites judges to set aside jury determinations." Anderson, *supra* note 14, at 495. The LDRC study of appellate reversal rates, discussed in depth *infra*, found no diminution in reversal rates after *Connaughton*, but noted that confusion as to the meaning of the standard was still prevalent in the lower courts. *See LDRC, Ten Years of Appellate Review, supra* note 70, at 2, 16-18.

⁷² The Supreme Court has never decided the issue of whether independent review is a "one way street." The lower courts are split. Some courts have reasoned that it would be impossible to apply a different standard depending on which party was appealing at that time. *See, e.g., Bartimo v. Horseman's Benevolent & Protection Ass'n*, 771 F.2d 894 (5th Cir. 1985). Other courts have argued that since the *Bose* standard is designed to protect errors which chill free speech, it is only available in appeals by the defense from pro-plaintiff verdicts. *See, e.g., Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (injunction on sale of advertisement case); *Brown v. K.N.D. Corp.*, 529 A.2d 1292 (Conn. 1987). For discussion of the split in the case law, see LDRC,

appeals from trial verdicts, although some courts have held it applicable to appeals from grants of summary judgment.⁷³ However, at a minimum, it is clear that when the defense appeals, the appellate court must review the record anew to ensure that it is satisfied that clear and convincing evidence of actual malice exists.

This is First Amendment process in the typical libel case: no protections at the initial pleading and discovery stages, but with ever-increasing safeguards from summary judgment through trial to appeal.

2. *An Evaluation of the Process*

At first glance this process seems to work. If we accept that the goal of First Amendment procedural innovations is to protect free speech, the Court has been remarkably effective. It has granted summary judgment protection, and studies have consistently found that between 70% and 80% of defense motions for summary judgment are granted, a very high rate when compared to other civil cases.⁷⁴ This high success rate on defense summary judgment

Ten Years of Appellate Review, *supra* note 70, at 4-5; Lucan et al., *supra* note 70, at 347-57; Anderson, *supra* note 14, at 498.

⁷³ Since appellate review of grants of summary judgment is traditionally *de novo*, the *Bose* standard should have no effect. However, some courts have expressly held the requirement of independent review applicable to summary judgment appeals, and one study found a higher defense victory rate where the courts applied the *Bose* standard. *See* LDRC SJ Update, *supra* note 39, at 23-24.

⁷⁴ The most comprehensive report on summary judgment in libel cases is the LDRC SJ Update, *supra* note 39. This report summarizes the data gathered in previous reports (a 1980-1986 study and a 1986-1990 study) and sets out newly collated data from 1990 to 1994. *See id.* The LDRC SJ Update, however, reports only on claims against the media and includes both libel and "related" cases (particularly privacy claims). However, its figures are the closest we have to reflecting what is going on in libel cases in the United States.

The LDRC SJ Update reports that during the entire period covered by the report (1980-1994), defendants obtained summary judgment at the trial court level on 82.2% of their motions. *See id.* at 13. The report finds that another 3.5% of cases saw a partial grant of summary judgment, leaving only 14.3% of cases where defense motions for summary judgment were denied in entirety. *See id.* at 13. The study found defense success rates to be almost the same in state and federal courts (82.9% in state court and 83.5% in federal court for the 1986-1994 time period) and to vary slightly between the federal circuits. *See id.* at 13-14.

The study also breaks down the success rates by the substantive basis for the motion. For the 1986-1994 period, actual malice-based motions were successful 81.6% of the time; negligence-based motions were successful 60.9% of the time; opinion-based motions were successful 79.6% of the time; substantial truth-based motions were successful 80.7% of the time; falsity-based motions were successful 79.7% of the time; privilege-based motions (including qualified, absolute, common law or statutory, but not fair comment, fair report or

motions has been sustained over fifteen years and may even be rising.⁷⁵ Moreover, there is evidence to suggest a correlation between the Court's decisions and the high defense success rate. In cases where the trial court cited to *Anderson*, there is an even higher defense summary judgment rate.⁷⁶

At the trial stage where the Court has granted some protections (in particular, by altering the burden of proof and the evidentiary standard) libel defendants fare less well, winning only four of fourteen trials (28.6%) during 1996.⁷⁷ Plaintiffs not only usually win at trial, they usually win big. For 1996

neutral reportage) were successful 53.1% of the time; fair comment-based motions were successful 50% of the time; fair report privilege-based motions were successful 73.6% of the time; neutral report privilege-based motions were successful 62.5% of the time; defamatory meaning-based motions were successful 77.4% of the time; "of and concerning"-based motions were successful 75% of the time; republication-based motions were successful 73.7% of the time; statute of limitation-based motions were successful 78.3% of the time; and other motions (for instance retraction, libel proof, libel *per se*) were successful 71.4% of the time. *See id.* at 18–21, tbl. 16.

Other studies report similar findings although in less detail. *See, e.g.,* GILLMOR, POWER, *supra* note 60 at 135–36 (study of reported public person cases against the media between 1982 and 1988, finding that defendants won 90.8% of the cases decided by summary judgment); Marc Franklin, *Winners and Losers and Why: A Study of Libel Litigation*, 1980 AM. B. FOUND. RES. J. 455 (reporting a success rate of 68% for the media on pre-trial actual malice motions).

The success rate reported in all these studies may be *very exaggerated* since all focus mainly or exclusively on reported decisions and most denials of summary judgment are unreported because the trial court issues no written opinion. Thus, denials of summary judgment are probably undercounted in all these studies, leading to reports of artificially high defense success rates. *See* LDRC SJ Update, *supra* note 39, at 13 n.7 (noting that in states with no interlocutory appeals, denials are unreported, leading to an artificially high success rates for defendants). Comparative data on the success of summary judgments in tort cases generally (expressed as the number of successful motions as a percentage of motions made) is not available. However, a nationwide tort study of tort case dispositions found that only 1.7% of all tort cases were terminated by summary judgment. *See* Steven K. Smith et al., *Tort Cases in Large Counties* (Apr. 1995, NCJ 153177) at 3 (tbl. 2).

⁷⁵ *See* LDRC SJ Update, *supra* note 39, at 1 (reporting that defendants obtained summary judgment at the trial level at an increasing rate in each of the three time periods studied, specifically 79.5% for the 1980–1986 period; 79.9% for the 1986–1989 period; and 86.7% the for 1990–1994 period). As discussed, these grants are overwhelmingly upheld when appealed. *See infra* note 81 and accompanying text.

⁷⁶ *See* LDRC SJ Update *supra* note 39, at 2, 23 (noting that in cases where the court cited *Anderson's* requirement that the plaintiff produce clear and convincing evidence at the summary judgment stage, the defendants were successful in 96.9% of trial court motions); *supra* note 43 and accompanying text.

⁷⁷ *See* LDRC 1996 Damages, *supra* note 65, at 1, 4, 5, tbl. 1b (these figures are for libel and "related" cases (including, for instance, privacy claims) against media defendants). This figure appears to reflect a decline in trial court victories beginning in 1995. For 1996 and

the average jury award was over \$3 million, and the median jury award was over \$2.3 million.⁷⁸ These loss rates appear to be far worse than those for other tort actions.⁷⁹ Post trial motions (for new trial, remittitur, and judgment notwithstanding the verdict) have limited success.⁸⁰

However, the Court's procedural innovations pay off at the appellate stage where defendants once again win at staggering rates. For instance, where defendants have won summary judgment below, the appellate courts overwhelmingly uphold such judgments, affirming trial court grants of

1995, the figures were almost identical, with the defense winning 28.6% and 29.2% of trials respectively. *See id.* This was a sharp decline from the media's 45.9% success rate of 1992–1993, a 38% success rate for 1990–1991, and a 35.8% success rate for the decade of the 1980s. *See id.* at 4, 5, tbl. 1b. Gillmor reports a similar rate (media defendants were successful in only 26.2% of cases which went to trial) in his survey of reported cases from 1982–1988 by public plaintiffs against the media. GILLMOR, POWER, *supra* note 60, at 137.

⁷⁸ *See* LDRC 1996 Damages, *supra* note 65, at 5, tbl. 2 (these figures are for libel and “related” cases (including, for instance, privacy claims) against the media defendants). If both jury and bench trial awards are included, the average award for 1996 is \$2,822,716 and the median is \$1,252,500. *See id.* Once again, it is important to put these most recent statistics in perspective, especially since the 1996 figures contain the *Food Lion* punitive damages award. The average damages figures have fluctuated widely (in part because of the small number of cases), reaching an all time high in 1990–1991. In 1990–1991 the average overall award (jury and bench trials) was over \$6.9 million, dropped drastically in 1992–1993 to \$821,843, only to rebound somewhat to the \$1.247 million figure for 1994–1995, and \$2.82 million for 1996. *See id.* at tbl. 2a. The median award shows similar variations: in 1990–1991, it was \$375,000, in 1992–1993, it was \$272,500, increasing in 1994–1995 to \$500,000, and to \$1,252,500 in 1996. *Id.* at tbl. 2a. Libel damages seem to go in cyclical patterns, making predictions difficult. However, 15 years of LDRC data show a continuous increase in average and median damage awards. *See id.* at tbl. 2 (showing increases in both awards for the 1990–1996 time period when compared with the 1980–1989 time period). One change underlying these statistics is the increase in large awards (over \$1 million or more). *See id.* at 2.

⁷⁹ The data on trial success rates for defendants is relatively limited. However, data from the Rand Foundation and the Jury Verdict Research Series suggest that success rates for media defendants in jury trials were far worse than success rates for defendants in medical malpractice and products liability suits. *See* LDRC 1996 Damages, *supra* note 65, at 15 (comparing defense success rates for the 1990s); *see also* Smith et al., *supra* note 74, at 5 (reporting that defendants won 74% of medical malpractice cases that went to trial).

⁸⁰ For 1996, no defense JNOV motions were granted, 11.1% of defense remittitur motions were granted, and 11.1% of new trial motions were granted. *See* LDRC 1996 Damages, *supra* note 65, at tbl. 3a (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants). This compares with the 1994–1995 period during which the figures were: 6.3% for JNOV motions granted, 6.3% for remittitur motions granted, and no new trial motions granted. *See id.* These figures represent a significant decline in the success of JNOV motions when compared with the 1980s, but represent an increase in the success of new trial motions. *See id.* at 8, tbl. 3a.

summary judgment in almost 75% of such appeals.⁸¹ In contrast, where the trial court has denied defense motions for summary judgment and defendants appeal, the denial of summary judgment is affirmed in only 33.7% of appeals.⁸²

Similar figures apply to appeals of trial verdicts. A ten-year study of appeals (1984–1994) found that the defense was successful in obtaining a complete or partial disturbance of pro-plaintiff judgments in more than seven out of ten appeals. Put another way, even when plaintiffs win at trial, 71.7% of appealed awards are ultimately reversed, remanded, or modified in defendants' favor.⁸³ In an incredible 41.3% of appeals, the defense obtained an outright reversal of the plaintiff's trial court victory.⁸⁴ In an additional 14.1% of appeals, the appeals court reversed the plaintiff's judgement, but remanded for a new trial. Even when defendants do not obtain a reversal, they see the damage awards drastically decreased. For instance, in an additional 16.3% of appealed cases the damages are reversed or reduced.⁸⁵ Plaintiffs' verdicts

⁸¹ See LDRC SJ Update, *supra* note 39, at 15–16, (reporting that appellate courts affirmed grants of summary judgment in 74.2% of appeals during 1980–1994 (these statistics are for libel and related claims (including, for instance, privacy cases) against media defendants); see also GILLMOR, POWER, *supra* note 60, at 137 (reporting that on first appeal, 76.8% of appeals of defense summary judgment grants were upheld, and at the second level, of the relatively few which were appealed, 76% were upheld).

⁸² See LDRC SJ Update, *supra* note 39, at 15–16. These statistics do not differentiate between jurisdictions which allow interlocutory appeal of denials of summary judgment, and the vast majority which permit an appeal of a denial of summary judgment only after a final judgment has been entered, usually after trial. For further discussion of interlocutory appeals, see *infra* notes 192–201 and accompanying text.

⁸³ LDRC, *Ten Years of Appellate Review*, *supra* note 70, at 1 (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants). Other studies yield similar figures. See, e.g., GILLMOR, POWER, *supra* note 60, at 137–38 (reporting that the 90 cases where plaintiff won at trial, 86 were appealed; only 35 were upheld on appeal, 16 with remittiturs; when 15 of these 35 were appealed to the next appellate level, seven more were overturned; a third appeal led to one more reversal).

⁸⁴ See *id.* at 1 (this represents 38 out of the 92 judgments).

⁸⁵ See *id.* at 1, tbl. 1 (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants). Of the 16.3%, 6.5% are reversals of the punitive award, 2.2% are reversals of the compensatory award, and 7.6% are affirmances with remittitur. See *id.* This appellate revisiting of damage awards causes a great disparity between the amounts awarded at trial and the amounts plaintiffs recover. For instance, for the 1990s, while the initial trial court awards averaged over \$899,612, as finally affirmed, the average fell to \$555,759. See LDRC 1996 Damages, *supra* note 65, at tbl. 2g (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants). Other studies have found similar figures. See, e.g., GILLMOR, POWER, *supra* note 60, at 137 (reporting a mean average payment of \$504,000 in 1982–1988 public person versus the media reported cases).

survive intact in only 28.3% of appealed cases.⁸⁶ If we look only at appellate courts' consideration of the question of actual malice, independent review takes an even starker toll on plaintiffs' trial court victories: when independent review was applied, appellate courts reversed pro-plaintiff judgments on the issue of actual malice in 66.7% of appealed cases.⁸⁷ It is hardly surprising that defendants almost always appeal, given these high success rates.⁸⁸

Thus, the First Amendment procedural protection crafted in *Bose* seems to be a remarkably effective tool for protecting First Amendment interests. It called for stringent appellate review to protect speech and it has produced incredibly high reversal rates of pro-plaintiff verdicts. There is even some empirical evidence which suggests that the *Bose* requirement of independent review is the cause of these reversals. The 1994–1995 LDRC report found that the rate of outright reversals in favor of defendants was much higher, in fact was more than double, when the court applied independent appellate review.⁸⁹ Perhaps one statistic best reveals the power of *Bose*'s requirement of independent appellate review: when appellate courts applied independent

These reversal rates can be compared with those reported in a one year study of the federal appellate courts' decisions in civil cases where there was a challenge to the sufficiency of evidence supporting a jury verdict. See Eric Schnapper, *Judges Against Juries: Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 246–47. Schnapper reports an appellate disturbance rate of 49% (this included partial reversals). See *id.* The rates for disturbance of plaintiff verdicts was considerably higher (at 52.5%), than the rates for disturbance of defense verdicts (at 23%). See *id.* at 250.

⁸⁶ See *id.* at 1, tbl. 6 (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants).

⁸⁷ See *id.* at 1, tbl. 6 (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants). This figure is for appeals when independent appellate review is applied. Even if we look at all appeals on the actual malice issue, including those where it is not clear if independent appellate review is applied, the outright reversal rate is still 51.95%. See *id.* at tbl. 6 (calculated from combining figures).

⁸⁸ See *supra* note 68 (estimating an over 90% appeal rate from all verdicts and a 95% appeal rate by defense from pro-plaintiff trial verdicts).

The success rate of appeals taken by plaintiffs from trial verdicts in favor of defendants is more in line with the norm. There are fewer plaintiffs' appeals. For example, of 112 appeals decided in the 1984–1994 appellate review, only 20 were taken by plaintiffs. See LDRC, *Ten Years of Appellate Review*, *supra* note 70, at 1 (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants). Plaintiffs obtained complete reversals in only 20% of their appeals, and of these, half were overturned at a later stage. *Id.* at 2, tbl. 3.

⁸⁹ See *id.* at 1 (reporting that the outright reversal rate was 53.7% in cases where independent appellate review was applied, but only 23.7% when it was not). Independent review also decreased the number of outright affirmances of plaintiffs' verdicts. See *id.* (these figures are for libel and “related” cases (including, for instance, privacy claims) against media defendants).

appellate review to the issue of proof of falsity, the courts reversed 83.3% of the time; when the courts applied the usual standard of "clearly erroneous," they reversed 8.3% of the time.⁹⁰

When looked at in combination, the impact of the Court's First Amendment process is striking: between 70% and 80% of all defense motions for summary judgment are granted. Of the suits which remain, plaintiffs lose about a third of them at trial. And of those cases that plaintiffs win at trial, the victory is usually short lived—an appeal is almost certain and 70% of defense appeals see pro-plaintiff trial verdicts reversed, remanded, or modified.⁹¹ Studies have repeatedly reported that only 5%, and up to perhaps 10% of plaintiffs who file suit, ever recover.⁹² This picture seems to reflect well on the Court's efforts to protect free speech. The very stages of litigation which the Court has altered procedurally to protect free speech, summary judgment and appellate review, eliminate the vast percentage of plaintiffs' claims.

3. *A Second Glance*

While at first glance the Court's procedural protections seem highly effective, a second look causes one to question this conclusion. First, one of the largest costs in a libel case is discovery. It is easy to cite the exceptional cases such as *Herbert v. Lando* (where Lando's 26 volume—3,000 page—deposition continued intermittently for over a year)⁹³ or *Westmoreland* (where the total legal fees are estimated to be around \$10 million and the plaintiff's discovery on actual malice alone involved the detailed depositions of fifteen reporters,

⁹⁰ See *id.* at 1 (these figures are for libel and "related" cases (including, for instance, privacy claims) against media defendants). The same gulf appears when the issue is defamatory meaning. If the appellate court applies independent review there is a 75% reversal rate. If instead it concludes that the clearly erroneous standard applies, there is a 0% reversal rate. See *id.* The split in the lower courts as to whether independent appellate review applies to issues such as falsity and defamatory meaning is discussed in *supra* note 70.

⁹¹ See *supra* notes 68, 75, 77, 83.

⁹² See David Anderson, *Who Needs Libel Reform?*, 338 PLI Libel Litigation 1992, 639, 642 (1992) (opining that "[u]ltimate success rates for media libel defendants are upwards of ninety percent, probably the highest of any identifiable class of tort defendants"); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 838 (1986) (citing a 5% chance of the defendant suffering defeat); accord Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795, 803 (1981); see also Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (citing a less than 10% success rate for plaintiffs in court); GILLMOR, POWER, *supra* note 60, at 168 (reporting that in his study, 93% of plaintiffs lost).

⁹³ *Herbert v. Lando*, 441 U.S. 153, 176 n.25 (1978).

researchers, editors, and production personnel).⁹⁴ However, even in a run-of-the-mill libel case, the cost of discovery is high.⁹⁵ In addition to the obvious costs (attorney fees, court reporter, transcription, document production, and copying costs), are the hidden costs, for instance, the loss of journalists' and editors' time as they are pulled away from their duties to search for documents, meet with attorneys, and attend depositions.⁹⁶ Thus, much of the cost of

⁹⁴ See *Westmoreland v. C.B.S.*, 596 F. Supp. 1170 (S.D.N.Y. 1984); Pierre N. Leval, Commentary, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287, 1295 (1988) (reporting high costs and fifteen depositions); GILLMOR, POWER, *supra* note 60, at 21 (citing a \$10 million figure reported in RENANTA ADLER, RECKLESS DISREGARD (1986)); see also Rosell L. Wissler et al., *Resolving Libel Disputes Out of Court: Libel Dispute Resolution Program*, in REFORMING LIBEL LAW, 286-87 (John Soloski & Randall P. Bezanson eds., 1992) (reporting that the estimated defense costs in the *Westmoreland* case "ran about \$6 million"). Other multi-million dollar defense cases are *Sharon v. Time Magazine Inc.*, 103 F.R.D. 86 (S.D.N.Y. 1984) (cited in Wissler et al., *supra* estimating costs at \$6 million), and *Wayne Newton v. N.B.C.*, 930 F.2d 662 (9th Cir. 1990) (cited in GILLMOR, POWER *supra*, note 60, at 130 reporting a \$9 million defense cost). These are figures for the entire litigation process, including discovery, motion practice, trial, and appeal(s).

The high cost of defense has been repeatedly noted by scholars. See David A. Barrett, *Declaratory Judgment for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 858 (1986) ("[T]he costs of defending libel suits have risen substantially. Lawyers' fees and expenses, together with indirect expenditures of personnel time, have escalated to the point that winning a suit may be as costly as losing."); Anderson, *supra* note 14, at 488 ("[E]ven the least meritorious cases can require extensive discovery on both sides"). Of course the media is usually insured both as to litigation cost and as to damages from an adverse verdict. See *id.* at 547-48 (attributing the media's lack of interest in reform as in part driven by the availability of insurance).

⁹⁵ Estimates of legal fees for the typical libel case vary. See, e.g., GILLMOR, POWER, *supra* note 60, at 20 (citing American Society of Newspapers Editors estimate of a minimum cost of defending a libel suit at \$95,000; to the insurance carriers estimate of \$150,000; and to one scholar's estimate of \$200,000, with appeals to the United States Supreme Court doubling that amount); see also Wissler et al., *supra* note 94, at 318 n.11 (citing a 1980s report of defense legal fees identifying libel suits as generally costing between \$200,000 to \$500,000).

One author, using 1980s costs, estimated that the cost to get to the summary judgment stage was \$225,000 with a further \$25,000 of costs to prepare the motion itself. See GILLMOR, POWER, *supra* note 60, at 20, 130 (citing M. Garbus, *The Many Costs of Libel*, 230 PUBLISHERS WKLY. 13-16 (1986)).

⁹⁶ As one commentator has observed: "it is hard to conceive of any legal rule that would involve the courts more deeply in [the editorial] process than the actual malice rule does." Anderson, *supra* note 14, at 516 (detailing the scope of intrusion into the editorial process entailed in any libel lawsuit); see also Barrett, *supra* note 94, at 847, 858 ("[T]he time and energy expended by management and news staff in defending a suit can be enormous. Reporters and editors often have been effectively transferred to the publisher's legal staff, forced to work full time on their own legal defenses.") (footnote omitted).

defending a libel suit has already been incurred by the time the first constitutional protection, an enhanced summary judgment standard, kicks in. Perhaps equally disturbing, the courts may well be failing to grant summary judgment as often as they should. Only 33.7% of denials of defense motions for summary judgment are affirmed on appeal.⁹⁷ This suggests that a high proportion of defendants who have endured the expense of a trial (recall that defendants move for summary judgment in nearly all cases) should have been granted judgment as a matter of law. Thus, while the Court's reform of summary judgment does eliminate many plaintiffs' claims, it does nothing to remedy the high cost of discovery, and statistics suggest that groundless claims do survive, at least through trial.

The Court's reform of the trial stage can also be criticized. Trial remains extremely time consuming and costly (both in legal fees and reporters' and editors' time). Moreover, as noted above, the procedural protections grafted on to the trial stage have had little impact: plaintiffs consistently win and win big.⁹⁸ Justice Black's warning in *New York Times*, that no "different verdict would have been rendered here whatever the Court charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press,"⁹⁹ seems to have proved true.

The final troublesome feature of the libel litigation process is evident when we focus on the appellate stage. Over 71% of pro-plaintiff verdicts which are appealed are disturbed, and of those, 41.3% are reversed outright.¹⁰⁰ When pro-plaintiff judgments on the issue of actual malice are appealed and subjected to independent review, over 66% are reversed.¹⁰¹ On one hand these rates speak well of the impact of *Bose*. Yet these figures also point to an incredibly high error rate in the system. This means that in at least 40% of appealed pro-plaintiff verdicts, the trial resulted in the wrong outcome. This number jumps to over 66% if we focus only on cases where independent appellate review is

⁹⁷ See *supra* note 82 and accompanying text.

⁹⁸ One could argue that this high pro-plaintiff trial victory rate seems a justified reaction to the summary judgment rates. After all, if 70% to 80% of defense motions for summary judgment are granted, presumably the remaining cases are the strongest plaintiff cases and repeated high verdicts would be appropriate. See LDRC 1996 Damages, *supra* note 65, at 4 (noting a continuing fall in defense success rates at trial and positing that this may be related to the decrease in cases actually going to trial). But this explanation is negated by the reversal rates. See *supra* notes 83-87 and accompanying text. To put it plainly, the plaintiffs are winning a large number of cases, which as a matter of law the appellate courts say they should be losing. See *id.*

⁹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 295 (1963) (Black, J., concurring).

¹⁰⁰ See *supra* notes 83-87.

¹⁰¹ See *supra* note 87 and accompanying text.

applied to actual malice. Such high error rates are hardly the mark of an accurate trial process. To put it plainly, the appellate reversal rates tell us that a lot of cases are coming out the wrong way at trial.¹⁰² Moreover, the high reversal rate is not simply an indication that the trial stage is proving highly inaccurate, but also demonstrates the inefficiency built into the process the Court has designed. A system with a high appellate reversal rate is a system that is inefficient both in terms of cost and time. Appellate reversals come only after both the defendant and the plaintiff have gone through the costs of pleading, discovery, summary judgment, trial, and appeal. In addition, appellate reversals come only after the judge, the jury, and the courtroom have been tied up for weeks of trial time, and at least one level of appellate court has read briefs, heard oral argument, and deliberated.¹⁰³ Yet appeals are a certainty in almost every case.¹⁰⁴

How great is the cost of a system which is so inaccurate that it almost guarantees an appeal, and perhaps, multiple appeals? It is difficult to estimate an exact figure of the cost of appeals. Again, one can cite to the estimated \$10 million spent by CBS defending the *Westmoreland* case,¹⁰⁵ or the \$9 million spent by the libel insurer defending Wayne Newton's suit against NBC (both figures are for the entire case including appeals).¹⁰⁶ Even if we look for the typical libel case, 1980s estimates were running at between \$95,000 and

¹⁰² The reversal rates reported by LDRC are stated as a percentage of appealed cases, not as a percentage of pro-plaintiff trial verdicts. For example, of plaintiffs' victories which are appealed by the defense, 41% are reversed outright. Thus, the 41% reversal rate does not indicate that trial courts are getting the wrong result as a matter of law in 41% of trials. Some cases where the plaintiff wins at trial may be settled prior to appeal—and arguably (since the defense knows the high appellate reversal rates) the ones which are settled are those in which the plaintiff has the strongest case. Following this logic, the number of erroneous results at trial level (expressed as a percentage of total trials) is probably less than 41%. However, the number is probably fairly accurate. The data gathered by Gillmor does indicate that, as we would expect, given the high reversal rates, most cases where the plaintiff wins at trial are appealed. See GILLMOR, POWER, *supra* note 60, at 137. He reports that of the 122 cases in his study which went to trial, plaintiffs won 90, and 86 of these were appealed. See *id.* Cf. LDRC 1996 Damages, *supra* note 65, at 3, 8 (discussed in note 68 *supra*, noting an increase in settlement prior to appeal in the 1990s). Thus the number of pro-plaintiff judgments appealed is probably fairly close to the total number of pro-plaintiff trial judgments.

¹⁰³ See Matheson, *supra* note 14, at 283–84 (arguing that while appellate review corrects erroneous judgments, it “comes too late” to address the most serious problems with the actual malice standard).

¹⁰⁴ See *supra* note 68 and accompanying text (estimating an over 95% appeal rate from pro-plaintiff trial judgments).

¹⁰⁵ See GILLMOR, POWER, *supra* note 60, at 21 (citing ADLER, *supra* note 94). Other estimates are set out in *supra* note 94.

¹⁰⁶ GILLMOR, POWER, *supra* note 60, at 130.

\$200,000 per case, but the figures doubled if an appeal to the United States Supreme Court was added on.¹⁰⁷ One figure consistently reported is that legal fees constitute as much as 80% of the aggregate costs of defense, with court costs and damage awards constituting the remainder.¹⁰⁸ Plaintiffs, usually proceeding on contingency fee arrangements, spend less.¹⁰⁹

The process as it currently functions is not only costly, but also long. Because the defense's main protections are in the appellate process, ultimate resolution of cases can take almost a decade.¹¹⁰ Cases are almost always appealed, often several times, and a remand will usually trigger another trial and a second set of appeals.¹¹¹

To be frank, the Court's effort to create a First Amendment process has been largely a failure. The Court's First Amendment process decisions conflict and lack any explanation of when procedural variations will be granted. We have a frequently erroneous, high cost, slow moving system that serves neither plaintiffs, defendants, nor the public.¹¹² We need to re-examine when and why

¹⁰⁷ See *id.* at 20.

¹⁰⁸ See RODNEY A. SMOLLA, *SUING THE PRESS* 74-75 (1986). Gillmor reports similar data from insurance carriers. See GILLMOR, POWER, *supra* note 60, at 130-31 (noting that 80% to 85% of monies paid out by the insurance companies in libel cases went for defending libel suits, only the remaining 15% to 20% were spent on damages).

¹⁰⁹ See Randall P. Bezanson et al., *The Economics of Libel: An Empirical Assessment*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 23-34 (Everette E. Dennis & Eli M. Noam eds., 1989) (reporting that a 1980s study of plaintiffs discovered that most plaintiffs spend less than \$5,000 in litigating, that two-thirds of plaintiffs are offered some type of contingency agreement, and that 16% of libel plaintiffs in the survey had no litigation costs and 30% spent less than \$3,000). Cf. Anderson, *supra* note 14, at 542 (estimating that in high profile cases such as *Tavouleras*, *Wayne Newton*, and *Westmoreland*, plaintiffs' legal fees can be in excess of \$1 million).

¹¹⁰ GILLMOR, POWER, *supra* note 60, at 24-31 (citing the length of litigation in a series of public person libel suits in the 1980s, including *McCoy v. Hearst*, 727 P.2d 711 (Cal. 1986) (eight years appellate process) and *Costello v. Capital Cities Communication*, 532 N.E.2d 790 (Ill. 1988) (nine years appellate process)). Gillmor's study which reviewed all reported cases in the *Media Law Reporter* for 1982-1988 concludes that a majority of cases (59.2%) take three or fewer years to complete; 38.7% take four to nine years to complete; and 2.2% take more than nine years to complete. See GILLMOR, POWER, *supra* note 60, at 143, 214 (tbl. 14). These figures may be an underestimation of the time taken as Gillmor includes as "final" cases in which appeals may still be pending. See *id.* at 143; see also Anderson, *supra* note 14, at 510 (noting that "[c]ases that turn on actual malice sometimes continue for ten or fifteen years").

¹¹¹ See GILLMOR, POWER, *supra* note 60, at 137 (reporting that almost 91% of all libel jury verdicts were appealed, 22.9% of them through at least two levels of appeal), 68 (discussing the breakdown of the 91% statistic).

¹¹² As one commentator has noted, summarizing his research:

we will grant procedural accommodations to promote First Amendment values to see if we can design a more rational and effective set of procedural safeguards.

III. RECONSIDERATION AND REFORM

In this section, I return to the basic question of what we want a First Amendment process to achieve. First, I identify basic process goals; that is, the goals we would want any procedural system to strive for. Then I question how these goals should be modified considering that we are designing a process that must be especially solicitous of First Amendment interests.¹¹³ I argue that the three goals of a First Amendment process should be accuracy, speed, and efficiency. I posit that the Court's decisions have promoted only one goal—accuracy—and that the problems of the current system stem from the Court's pre-occupation with this goal and its failure to recognize the equally important goals of speed and efficiency. I conclude by urging the Court to adopt a more balanced approach, giving consistent consideration to all three goals, and offer a number of specific reforms towards that end.

Nearly 55 percent of cases involving summary judgments and motions to dismiss and more than 90 percent of cases involving jury trials reached the first appellate level; most cases ended there with defendants winning more than two thirds of the time. Therefore vast amounts of time and money are expended in suits that will eventually be won by more than 70 percent of defendants in this study, and in other studies, with no apparent benefit to public discourse.

. . .

As it stands today, libel law is not worth saving. What we have is a system in which most claims are judicially foreclosed after costly litigation. It gives plaintiffs delusions of large windfalls, defendants nightmares of intrusive and protracted litigation, and the public little assurance that the law favors truth over falsehood. If we can do no better, honesty and efficiency demand that we abolish the law of libel.

GILLMOR, POWER, *supra* note 60, at 168. *See also* Anderson, *supra* note 14, at 489.

¹¹³ The Court has refused to outline when it feels that procedural accommodations should be granted to protect free speech, instead reconciling itself "to answering the question on a case-by-case basis . . . until some workable general rule emerges." *Waters v. Churchill*, 511 U.S. 661 (1994). *Waters* is discussed in *supra* notes 47–52 and accompanying text.

A. Free Speech and Process Goals: Congruence and Conflict

In all litigation, libel or otherwise, the interests at stake are those of both of the parties and of the legal system itself.¹¹⁴ The typical goals of a procedural system are well illustrated by the announced aims of the federal rules: "the just, speedy, and inexpensive determination of every action."¹¹⁵ Process should be "inexpensive," in other words, economically *efficient* for both parties and for the judicial system itself, and it should also be "*speedy*" so parties' rights are vindicated effectively. Equally, the system must be "just," in the sense that it should be "*accurate*." An accurate process seeks to ensure that the right result is reached on the merits of each case.¹¹⁶

However, if we are designing a First Amendment process, the process must be structured to protect speakers and to ensure that they are not deterred from speaking for fear that they will be unjustly subject to suit.¹¹⁷ Often, the procedural characteristics required to protect speech are identical to the general procedural goals we have outlined above. For instance, both First Amendment values and process values are served by the *speedy* resolution of a suit. The less time cases take to be resolved, the less time journalist and editors will be pulled away from their jobs to aid their lawyers in litigation and the less time they will be exposed to the unease which is inevitably triggered by having a multi-million dollar claim pending against them.¹¹⁸ Thus, speedy resolution of libel disputes is a goal of both process and the First Amendment.¹¹⁹

¹¹⁴ By the interest of the legal system, I mean the public's interest in having a system that effectively resolves disputes in an economical fashion.

¹¹⁵ FED. R. CIV. P. 1. Cf., Matheson, *supra* note 14, at 228-31 (defining the goals of process to be fairness and efficiency—meaning accuracy, minimum cost, and predictability—but arguing that procedure should not be used to "ignore or amend substantive law"). Thus, Matheson would create a presumption against formalizing special procedural rules for substantive areas.

¹¹⁶ The right to a just process has a constitutional dimension since it is the essence of the Fourteenth Amendment's guarantee of "due process of the law." Yet as one commentator has noted, while the constitutional dimensions of criminal procedure have been repeatedly explored by the Court and commentators, the constitutional aspects of civil procedure have largely been ignored. See generally John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984).

¹¹⁷ For a discussion of this chilling effect, see *infra* notes 123-30 and accompanying text.

¹¹⁸ See *supra* text accompanying notes 94-96 (detailing the enormous time and energy spent by journalists and editors in defending libel suits).

¹¹⁹ Plaintiffs would also be aided by the speedier resolution of cases. Most plaintiffs fault the current system for delay and would like a speedier resolution. See RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 178 (1987) ("While, as a

Efficiency should also serve both process and First Amendment ends. First Amendment goals should be served by an inexpensive process because the cheaper the process of defending a lawsuit, the less a speaker will fear litigation and the less that speaker should be “chilled.”¹²⁰ Numerous scholars have now recognized that the high cost of defending libel suits itself imposes a significant chilling effect.¹²¹ Thus, an efficient, inexpensive process would seem to further both process and First Amendment goals.¹²²

The conflict in goals comes when we ask what it means for a First Amendment process to be *accurate*. The rationale underlying all First Amendment process is the desire to create a process that will minimize the chilling effect—that will prevent speakers from being deterred from speaking for fear of liability.¹²³ We “over” protect speech so that speakers will not be deterred.¹²⁴ To develop an effective First Amendment process it is therefore

group, the plaintiffs stated that they were aware from the outset that the litigation process could be prolonged, they were never the less frustrated by the extent of time consumed, and the number of levels of judicial action.”).

¹²⁰ It is true that if costs to plaintiffs decrease, there may be an increase in the number of suits filed and this may increase the chill on potential defendants, because if it costs little to litigate, plaintiffs may be encouraged to file frivolous suits. See Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, in REFORMING LIBEL LAW 263–64 (John Soloski & Randall P. Bezanson eds., 1992) (arguing that the press is not willing to give up actual malice in return for a declaratory judgment action, despite the cost of litigating actual malice, because of fear of an increase in frivolous suits); see also, Anderson *supra* note 14, at 542–46 (arguing that the media as a repeat player in libel litigation is willing to incur large legal costs to ensure victory, effectively pricing plaintiffs out of the case and concluding that “it is entirely possible that media fear the chill of expensive litigation less than they fear the chill of more frequent accountability”). However, if the costs of both sides decrease, the defense should benefit because 80% of current defense costs of libel are from litigation expenses. See *supra* text accompanying note 108 (on litigation costs).

¹²¹ See *supra* notes 94, 96 and accompanying text; *infra* note 131 and accompanying text.

¹²² Once again, an inexpensive process also meets plaintiffs’ needs, although plaintiffs’ litigation costs are estimated to be far lower than defense costs. See *supra* note 94, 109 and accompanying text.

¹²³ See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 685 (1978) (noting that the “chilling effect concept has been recognized most frequently and articulated most clearly in decisions chiefly concerned with the procedural aspects of free speech adjudication”).

¹²⁴ If this were our sole goal, then we could devise an even more protective First Amendment process. For instance, we could adopt a rule that every plaintiff must produce clear and convincing evidence of actual malice within 3 days of filing their complaint or summary judgment would be granted. Such a rule would clearly decrease chilling effect. Potential libel defendants could count on a high rate of dismissals for relatively little cost. Yet, I would suggest that we would reject this rule because it denies the plaintiff a fair opportunity

essential to understand what we mean by the chilling effect, and how much of that effect we are prepared to tolerate. The Court has told us that some chilling effect is good. Those who would tell a knowing or reckless lie are not, according to the Court, contributing to public debate.¹²⁵ In fact their falsity harms that debate by misleading the public on vital issues. Thus, libel law is intended to chill or deter the intentional or reckless liar.¹²⁶

Yet if we allow libel law to chill the intentional liar, the danger is that others, who seek to announce the truth, will be deterred from speaking. This begs the question: why should those who seek to speak the truth be deterred by a law which punishes those who intentionally lie? The answer is because a legal system may err.¹²⁷ If we had a perfect process, we could guarantee to any speaker that if she did not intentionally or recklessly lie she would have nothing

to present their claim on the merits. Instead, the Court has been attempting to devise a process which eliminates the chilling effect without denying the plaintiff a fair hearing. For instance, rather than the rule on summary judgment suggested above, the Court in fact held that while summary judgment for lack of evidence of actual malice should be favored, it would be appropriate only after the plaintiff had an opportunity to conduct discovery. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1985).

¹²⁵ *See, e.g., Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring) (criticizing the *New York Times* test because it leaves falsity undetected and the public's "information about public officials and public affairs is polluted and often remains polluted by false information"); *Herbert v. Lando*, 441 U.S. 153, 171 (1978) (noting that the *New York Times* test is supposed to chill the dissemination of false information); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1975) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues.").

¹²⁶ *See Herbert*, 441 U.S. at 171.

¹²⁷ As Professor Schauer has pointed out in his classic article on the chilling effect, the degree of chill a speaker will experience depends on "the probability of an erroneous verdict times the harm produced by such a verdict." Schauer, *supra* note 123, at 695. Such errors can flow from mistakes of law, errors in the fact-finding process, and from the personal prejudices of the judge or jury. *See id.* at 694-95. Professor Schauer notes the uncertainty in the legal process:

In all litigation, and indeed the entire legal process, is surrounded by uncertainty. The interplay of human witnesses, jurors, judges and lawyers coupled with the imprecision of "people-made" rules guarantees that there will be little in the realm of litigation of which we can be sure; thus, the ability to predict accurately the outcome of any adversary confrontation is by no means a process in which we can maintain a high degree of confidence. Given this overriding uncertainty, errors of different kinds can occur.

Id. at 687; *see also*, Matheson, *supra* note 14, at 231-32, 236-37 (discussing errors in legal process).

to fear. It is because our system contains a likelihood of error, that speakers may remain silent or be "chilled."¹²⁸

Thus, in one sense the goal of a free speech process—accuracy of result—is the same as the general process goal. Yet this similarity hides a profound difference: process abhors any inaccuracy, be it pro-plaintiff or pro-defendant. In contrast, in free speech process, the concern is principally with errors that penalize the defendant speaker.¹²⁹ If a plaintiff erroneously has her law suit dismissed, there will be no chill on speakers. In fact all speakers, including the intentional liars, will be encouraged. In contrast, when one who speaks the truth is erroneously found liable and forced to pay damages, other truth speakers will be chilled. From a First Amendment process perspective then, we want to eliminate the chance of plaintiffs erroneously recovering (pro-plaintiff error), far more than we fear defendants erroneously escaping liability (pro-defendant error).

Thus, a First Amendment process shares certain common goals with all processes, in particular a desire to resolve disputes *speedily* and *efficiently*. Where it parts company is the meaning of a "just" resolution. The general process goal is to minimize errors whether pro-plaintiff or pro-defendant. In a First Amendment process, the key to the third goal—*accuracy*—is to minimize pro-plaintiff errors.

¹²⁸ This brings us back to the debate between Justices Brennan and Black in *New York Times* with which I started this Article. Justice Brennan recognized the chill that the potential for error created, noting that "critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). However, he argued that he could effectively decrease the chill on truth speakers, or give them a breathing space, if he built in sufficient substantive and procedural protections. Justice Black believed that whatever the protections, error would occur as long as libel law existed, and abolition was the only solution. See *supra* notes 1–15 and accompanying text.

¹²⁹ See, e.g., *Rosenbloom v. Metromedia*, 403 U.S. 29, 50 (1971) (Justice Brennan noted that "we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error . . . would create a strong impetus towards self censorship, which the First Amendment cannot tolerate"); see also Schauer, *supra* note 123, at 688, 704 (explaining that the chilling effect doctrine mandates the formulation of legal rules "that reflect our preference for errors made in favor of free speech").

B. Reassessing the Court's Efforts to Create a First Amendment Process

1. An Obsession with Accuracy?

In light of these three goals—accuracy, speed, and efficiency—we can now reassess the First Amendment process created by the Court. My thesis is simple: the Court has ignored speed and efficiency, and focused, almost exclusively, on accuracy. The flaws in the current system largely reflect this doctrinal error.

As is clear from our previous analysis, the Court's current process for deciding libel suits woefully fails to meet two of the identified goals—speed and efficiency. Instead, the process is slow moving and costly. The Court's decisions do not simply fail to promote these two goals, but have actively undermined them. For instance, it is now clear that chill on speakers comes not just from fear of damage awards,¹³⁰ but also from concern about the costs of litigation.¹³¹ Yet while the Court in *New York Times* acknowledged the potential chill created by litigation costs,¹³² it did nothing to address them and may even have caused an increase in these costs.¹³³ *New York Times*'s adoption of a fault standard opened up an entirely new avenue of discovery, into the

¹³⁰ The *New York Times* was faced with a verdict of \$500,000 which (when combined with suits by other Alabama officials) threatened to bankrupt it. See *New York Times*, 376 U.S. at 294–95 (Black, J., concurring) (noting multiple suits then pending against the *New York Times*); Lewis, *supra* note 3, at 35 (discussing the suits' potential impact on the *Times*' financial viability). This harm is real and perhaps has increased since jury verdicts have increased in the past two decades. See *supra* note 78 (discussing the increase in median and average damage awards over the past fifteen years).

¹³¹ See Anderson, *supra* note 14, at 516 ("For many potential defendants, the most relevant source of the chilling effect is not the danger of losing a judgment, but the prospect of having to pay the cost of defending."); Schauer, *supra* note 123, at 700 ("the costs involved in securing a successful judicial determination" is one factor which contributes to the overall chill). In fact, litigation costs make up 80% of the aggregate costs of defense (the remaining 20% covering damage awards and court costs). See *supra* note 108.

¹³² The Court did mention the dangers of litigation costs as a deterrent on speakers. See, e.g., *New York Times*, 376 U.S. at 279 (noting that truth was an insufficient defense because it did not reduce the speaker's "doubt whether [truth] can be proved in court or fear of the expense of having to do so") (emphasis added). However, the Court never returned to the issue of litigation costs, and did not address how the new standard of "actual malice" would impact such costs.

¹³³ See Anderson, *supra* note 14, at 516 (acknowledging the "possibility that the actual malice rule tends to increase potential verdicts and/or defense costs"); Matheson, *supra* note 14, at 238, 254–55 (arguing that actual malice is both difficult to apply and costly to litigate); see also *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (noting that actual malice standard may escalate costs because of increased discovery).

actions of the reporters and the editors. Since the Court held in *Herbert v. Lando*¹³⁴ that there was no privilege from such discovery, the costs of defense have continually increased, not only in terms of dollars spent on legal defense, but also in terms of the personnel time of editors and reporters.¹³⁵ Thus, the Court's adoption of actual malice not only did not promote, but actively undermined the goal of inexpensive, efficient litigation.

Other examples abound.¹³⁶ For instance, by creating independent appellate review, the Court has made at least one level of appeal typical in all libel cases, again increasing both the cost and time to get to a resolution.¹³⁷ In fact, the only process alteration mandated by the Court which seems to advance the goals of speed and inexpensiveness stems from its decision in *Anderson v. Liberty Lobby, Inc.*, making summary judgment easier to obtain in libel cases.¹³⁸ Ironically, there the Court denied that it was deciding a First Amendment process case.¹³⁹

Instead of promoting speed and inexpensiveness, the Court seems to have designed a process focused almost exclusively on the last goal—accuracy. Starting with *New York Times*, the Court has focused on the jury trial as the most significant source of pro-plaintiff error.¹⁴⁰ At trial, a truth speaker might

¹³⁴ 441 U.S. 153, 158 (1979).

¹³⁵ See also *Anderson*, *supra* note 14, at 516–521 (detailing the numerous factual questions concerning the action of reporters and editors that are inevitably raised by the actual malice test).

¹³⁶ Another example is the Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), where the Court held that the First Amendment did not limit a plaintiff's ability to sue in a state where she had never resided and where the defendants had never worked. See *id.* at 772–74. Efficiency would have militated in favor of denying jurisdiction in a state with so attenuated a connection with the subject of the litigation, yet the Court did not grant any procedural variation based on First Amendment interests. Accord *Calder v. Jones*, 465 U.S. 783, 790 (1984) (rejecting claims that the Court should grant a First Amendment procedural variation because reporters would be chilled by the cost and difficulties of defending in a jurisdiction remote from where they worked).

¹³⁷ See *supra* note 68. Of course the high cost of a libel suit may deter plaintiffs from filing suit. See *supra* note 120 and accompanying text (discussing the potential impact on plaintiffs' willingness to file libel suits if costs decrease).

¹³⁸ 477 U.S. 242 (1986) (discussed in *supra* notes 36–46); see also Matheson, *supra* note 14, at 297 (observing that *Liberty Lobby* is “attractive from a procedural cost standpoint”). As discussed *infra* note 150 and accompanying text, it is arguable that *Anderson* focused on accuracy, not speed and efficiency.

¹³⁹ See *supra* notes 39–42 and accompanying text.

¹⁴⁰ See *Schauer*, *supra* note 123, at 705–09 (characterizing Justice Brennan's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as an effort to decrease pro-plaintiff error through an alteration of substantive and procedural rules); Matheson, *supra* note 14, at 236 (arguing that *New York Times* was driven by a fear of error both in the form of inaccurate

be unable to marshal sufficient evidence to convince a jury of the truth of her statement or her lack of fault, or the evidence might be confusing and mislead a jury.¹⁴¹ With the evidence in equipoise or confused, the jury might erroneously conclude that the truth speaker should be held liable. Justice Brennan adopted three reforms to decrease this risk of error, two of which applied to the trial itself.¹⁴² First, he switched the burden of proof (it is the plaintiff who now must prove falsity and fault).¹⁴³ Second, he required a high level of proof (clear and convincing evidence).¹⁴⁴ These twin reforms should decrease erroneous pro-plaintiff verdicts since a jury that is torn by close or confusing evidence should hold for the defendant.

The third example of Justice Brennan's effort to improve accuracy was the adoption of independent judicial review, so that if the jury errs, the appellate court will overturn the jury's erroneous verdict.¹⁴⁵ This move may also have addressed Justice Black's more troubling concern, that juries would err not out of misunderstanding or mis-assessment, but deliberately because of antipathy for the defendant or the defendant's words.¹⁴⁶ Independent review allows appellate courts to correct any potential errors based on either jury bias or innocent error.

trial results and in the form of error by the speaker fearing that her truthful statements would be subject to suit).

¹⁴¹ See *New York Times*, 376 U.S. at 279 (noting that the defense of truth was inadequate because of "doubt whether it can be proved in court . . ."); see also Schauer, *supra* note 123, at 694-95 (identifying the difficulties of ascertaining the true facts from the evidence presented in court as a source of error).

¹⁴² Justice Brennan also sought to decrease the risk of pro-plaintiff error by altering the substantive law. For instance, the Court has required all plaintiffs to show fault. See *New York Times*, 376 U.S. at 279-80; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

¹⁴³ See *New York Times*, 376 U.S. at 279 (arguing that a defense of truth "with the burden of proving it on the defendant" would be insufficient to prevent the deterrence of true speech because of "the difficulties of adducing legal proofs that the alleged libel was true"). Justice Brennan also noted that "authoritative interpretations of First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker." *Id.* at 271.

¹⁴⁴ See *id.* at 285-86.

¹⁴⁵ See *id.* at 285 (noting that the Court must independently examine the record "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression").

¹⁴⁶ See *id.* at 294-95 (Black, J., concurring); see also Schauer, *supra* note 123, at 695 (identifying the "personal prejudices of the judge or jury" as a source of erroneous determinations). It was this source of error that Justice Black emphasized. Noting the South's hostility to those who supported desegregation, Justice Black argued that no different verdict would have been reached "whatever the court had charged the jury." *New York Times*, 376 U.S. at 295 (Black, J., concurring).

Thus, the First Amendment process created by the Court in *New York Times* focused on accuracy, specifically the dangers of pro-plaintiff jury error. It sought to decrease the chance of errors at trial and to reduce the impact of such errors by ensuring that appellate review caught any anti-speech error that did occur. Later decisions took much the same track. For instance, in *Gertz v. Robert Welch, Inc.*, and *Philadelphia Newspapers, Inc. v. Hepps*, the Court shifted the burden of proof of other elements to the plaintiff (which should cause juries to err on the side of the defendant).¹⁴⁷ In *Curtis* and *Gertz*, the Court expanded the cases to which the heightened standard of proof applied (again decreasing the chance of pro-plaintiff error).¹⁴⁸ Also, in *Bose Corp. v. Consumers Union of United States, Inc.* and *Harte-Hanks Communications, Inc. v. Connaughton*, the Court continued to promote independent appellate review (perhaps the most effective weapon against trial court inaccuracies).¹⁴⁹ It is even arguable that *Anderson v. Liberty Lobby, Inc.* (the only case to aid speed and efficiency) is in fact aimed at promoting accuracy since summary

¹⁴⁷ See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775, 777 (1986) (holding that plaintiffs in both public and private figure cases bear burden of proving falsity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring private plaintiffs to prove some level of fault, at least where speech is matter of public concern). In *Hepps*, the Court acknowledged that the burden of proof would impact accuracy, and held that the First Amendment required it to tip that balance in favor of reducing pro-plaintiff errors:

[T]here will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false, The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. . . . Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false. . . . In a case . . . where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.

Hepps, 418 U.S. at 776.

¹⁴⁸ See *Curtis Publishing Co v. Butts*, 388 U.S. 130 (1967) (extending the requirement of clear and convincing to public figures); *Gertz*, 418 U.S. at 350 (extending actual malice and its clear and convincing requirement to private plaintiffs seeking punitive or presumed damages). The Court has prevaricated as to what other elements may or may not trigger the clear and convincing evidence standard. See *supra* note 29.

¹⁴⁹ See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-11 (1984); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-86 (1989); see also *supra* text accompanying notes 81-87 (discussing independent appellate review).

judgment would prevent jury error from occurring by taking baseless cases away from the jury.¹⁵⁰

The Court's seeming obsession with accuracy may also explain its refusal to grant process breaks in *Calder v. Jones*,¹⁵¹ *Keeton v. Hustler Magazine, Inc.*,¹⁵² and *Herbert v. Lando*.¹⁵³ If accuracy of result is the sole goal of the Court in granting process modifications, then *Calder* and *Keeton* make sense: the location where a case is tried, while it may aid efficiency, bears no relationship to accuracy. Thus, if accuracy was the Court's sole goal, then it was correct to deny any process break.

An exclusive focus on accuracy may also explain *Herbert*, where the Court refused to grant a privilege against discovery into the thought processes of editors and reporters.¹⁵⁴ As the Court noted, full discovery from editors and reporters would promote accuracy: "[D]irect inquiry from the actors . . . suggests that more accurate results will be obtained" ¹⁵⁵ Thus, granting the process break sought by the press was not only unrelated to accuracy, it would impede it. In sum, the Court's decisions do reflect a common principle: an unacknowledged obsession with accuracy as the sole goal of a First Amendment process. This obsession started in *New York Times* and explains all of the Court's later decisions to grant or deny procedural accommodations in libel cases.¹⁵⁶

¹⁵⁰ See *supra* text accompanying notes 36–46.

¹⁵¹ 465 U.S. 783, 790 (1984).

¹⁵² 465 U.S. 770, 772–74 (1984).

¹⁵³ 441 U.S. 153, 158 (1979).

¹⁵⁴ See *id.*

¹⁵⁵ *Id.* at 172–73. The Court continues to stress accuracy, noting that "[i]n resolving the issue whether the publication was known or suspected to be false, it is only common sense to believe that inquiry from the author, with an opportunity to explain, will contribute to accuracy." *Id.* at 173.

¹⁵⁶ My position conflicts with the Court's statement that it cannot perceive any general rule in its cases. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994). If I am correct, there are two possible explanations for the Court's statement: either the Court realizes that it is focusing on accuracy but refuses to acknowledge it, or it simply has not realized what goal is driving its decisions. I think the latter explanation is probably (slightly) less insulting to the Court and has more support in the language of the cases. The Court's repeated citation to and continuing focus on *New York Times* reflects, I would argue, the Court's recognition that *New York Times* holds the key to when procedural variations should be granted. The Court's failure to agree on what the case means reflects its failure to perceive that a search for accuracy was at the heart of the Court's decision in *New York Times*. See *supra* note 47 (discussing the Court's focus on *New York Times*).

2. *The Impact of the Focus on Accuracy*

The result of this excessive preoccupation with accuracy is that the Court's process is severely flawed. It is flawed, first, because, as set out above in Part II.B, it has created a process which is costly and slow (hardly a surprising result given that the goals of speed and inexpensiveness have been ignored, and at times, undermined). The Court's promotion of appellate review, the most effective device for ensuring accuracy (yielding high levels of reversal of trial court errors), is also the most costly in terms of speed and inexpensiveness.

More troubling is that despite the Court's focus on accuracy, it does not seem to have achieved this goal. For instance, the Court has promoted frequent use of summary judgment, yet the reversal statistics of trial courts' denials of summary judgment seem high, suggesting that an unacceptable number of pro-plaintiff errors (given the goals underlying the First Amendment) continue to occur. In almost two thirds of cases where the defense moved for and was denied summary judgment, the denial was reversed on appeal.¹⁵⁷ Thus, trial court judges are continuing to err in favor of plaintiffs despite the Court's efforts to create a speaker-friendly summary judgment process.¹⁵⁸

But perhaps the most glaring failure of the Court's procedural jurisprudence is that the Court's alterations to the trial process have failed to increase accuracy at trial. The reversal rates on appeal tell us that juries continue to make errors in a staggeringly high number of cases. We must question why, given Justice Brennan's focus on reducing trial errors, we still have outright reversal rates of over 41% of appealed pro-plaintiff verdicts (a rate which rises to 66% where the issue is one of actual malice).¹⁵⁹

One explanation for high reversal rates is that jury bias against libel defendants, especially the media, continues, and so procedures intended to rein in juries are, as Justice Black suggested, doomed to failure. Studies

¹⁵⁷ See *supra* note 81. What the statistics suggest is a high pro-plaintiff error rate—not a high pro-defendant error rate which a First Amendment process calls for. For instance, pro-defense errors (i.e., where the defense gets summary judgment when it should not) is about 25%; yet pro-plaintiff errors (i.e., where the defense is denied summary judgment when it was entitled to it) is at almost 34%. See *id.* If the Court had created an effective First Amendment process, we would expect to see a much lower pro-plaintiff error rate. See *supra* notes 81–82 and accompanying text.

¹⁵⁸ Two explanations suggest themselves—both of which are discussed more fully *infra* in the context of juries. First, the trial courts may err in interpreting the legal standards—actual malice is a difficult concept whether you are a trial judge or a jury. See Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. Rev. 7 (1994). Secondly, trial courts may feel an antipathy to the press, causing bias—intentional or subconscious—against the defense.

¹⁵⁹ See *supra* notes 84, 87 and accompanying text.

continuously report that the public today dislikes and distrusts the media.¹⁶⁰ Thus, the high rate of jury errors in trial courts may be a product of jury antipathy to the press.¹⁶¹

A second explanation is that some of the substantive positions adopted by the Court have increased the likelihood of jury error, undercutting the Court's goal. For instance, the Court apparently failed to realize that the likelihood of jury error would be materially increased by the Court's adoption of the actual malice test. Interviews with juries show that they have little comprehension of the actual malice test.¹⁶² This is unsurprising given the Court's own admission that the term itself is unfortunate and misleading.¹⁶³ To apply actual malice, the

¹⁶⁰ See GILLMOR, POWER, *supra* note 60, at 16–17 (reporting public attitudes on general First Amendment issues); Schauer, *supra* note 123, at 696 (opining that “the public’s natural resistance to unpopular or offensive ideas and opinions, provides a clear but immeasurable degree of additional built-in error in first amendment cases”); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 887–89 (1963) (arguing that suppression, not respect for freedom of speech, comes most easily to the public).

¹⁶¹ Over the last seventeen years, juries have found against media defendants and awarded far higher damages, than in cases tried to the judge alone. See LDRC 1996 Damages, *supra* note 65, at 9–10.

¹⁶² See GILLMOR, POWER, *supra* note 60, at 17 (citing a Gallup poll that found that the public “neither understands nor accepts the rationale of ‘actual malice’”).

¹⁶³ See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1981). In *Masson*, the Court noted the confusing nature of the term actual malice:

[W]e have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect the phrase may even be an unfortunate one. In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.

Id. (citation omitted); see also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989) (noting that actual malice is “confusing” and the trial court should instruct the jury in the plain English definition); *Herbert v. Lando*, 441 U.S. 153, 199–200 (1979) (Stewart, J., dissenting) (regretting the choice of the phrase actual malice because of the confusion it can cause).

In fact these problems with applying actual malice were pointed out by the concurring Justices in *New York Times* itself. Justice Goldberg noted that:

If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice.

jury must understand that it has nothing to do with malice,¹⁶⁴ yet grasp the subtle notion that evidence of malice may show actual malice.¹⁶⁵ They must likewise grasp that while actual malice is greater than negligence,¹⁶⁶ negligence may be considered in assessing actual malice.¹⁶⁷ A myriad of other nuances surround our understanding of what is and is not actual malice (e.g., use of anonymous sources;¹⁶⁸ lying post publication;¹⁶⁹ failure to investigate¹⁷⁰). In fact, as one recent article points out, the lower courts have developed a detailed and often contradictory rubric of what it means to have published with actual malice.¹⁷¹ If the lower courts cannot comprehend what actual malice means in any given fact scenario, can we realistically expect juries to do so?¹⁷²

It seems axiomatic that the more complex the law, the greater likelihood of error by juries.¹⁷³ Yet the concept of actual malice is not the only difficult

376 U.S. 254, 302 n.4 (1964) (Goldberg, J., concurring); *see also id.* at 293 (Black, J., concurring) (opining that “[m]alice,” even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove”).

¹⁶⁴ *See, e.g., Harte-Hanks Communications, Inc.*, 491 U.S. at 666 (“It is also worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or ‘malice’ in the ordinary sense of the term.”).

¹⁶⁵ *See, e.g., id.* at 668 (noting that “it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry”).

¹⁶⁶ *See, e.g., id.* at 666 (rejecting the argument that negligence or departure from professional standards constitutes actual malice).

¹⁶⁷ *See, e.g., id.* at 668 (holding that evidence of lack of care could be used to prove actual malice).

¹⁶⁸ *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

¹⁶⁹ *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498 (1984).

¹⁷⁰ *See St. Amant*, 390 U.S. at 731, 733 (observing that press need not investigate to avoid liability under actual malice standard); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (noting that “mere proof of failure to investigate, without more, cannot establish reckless disregard for truth”); *cf. Harte-Hanks Communications, Inc.*, 491 U.S. at 692 (finding actual malice where newspaper failed to interview a key witness or listen to a tape of the alleged conversation, thus engaging in “purposeful avoidance of the truth”).

¹⁷¹ Murchison et. al., *supra* note 158, at 106–09 (noting that under the actual malice standard of *New York Times* courts have created an often contradictory system of journalistic norms); *see also Matheson*, *supra* note 14, at 238 (actual malice is hard for juries to apply).

¹⁷² *See GILLMOR, POWER*, *supra* note 60, at 16 (attributing the high reversal rate of trial court judgments to “the fact that juries simply cannot unravel the instructions they get from the trial judges in libel cases [or to the fact that] trial judges themselves in some cases inadequately understand the intricate rules of libel”).

¹⁷³ *See Schauer*, *supra* note 123, at 695 (noting that “as the legal concepts become more complex, the probability of error is increased”). Legal complexity may increase chill not just

concept created by the decision in *New York Times*. For instance, jurors are sometimes called upon to determine whether the issue is one of public or private concern,¹⁷⁴ using a test which again seems an epitome of ambiguity and vagary.¹⁷⁵ Given the level of complexity of substantive law that the Court has developed, the risk of unintentional error has significantly increased. Thus, while attempting to design a process to increase accuracy, *New York Times's* changes to the substantive law may have actually increased the likelihood of jury error.

In sum, the Court has aimed for accuracy, ignoring speed and efficiency. This in itself has created a seriously flawed process. In addition, the process changes adopted by the Court have done little to improve accuracy, especially at the trial court level, leaving the defendants with an error rate that gets the issue of actual malice wrong in 66% of appealed pro-plaintiff verdicts.¹⁷⁶ Moreover, the most effective tool the Court fashioned to address these inaccuracies—appellate review—comes at an incredible cost in terms of speed and efficiency.

by increasing the chance of error but also by increasing the actors doubts as to whether their conduct is protected, and also by increasing the costs of any litigation. *See id.* at 698–700.

¹⁷⁴ *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (holding that the level of constitutional protection depends on whether the speech is on an issue of private or public concern).

¹⁷⁵ The Court's test has been subject to criticism. *See Dun & Bradstreet, Inc.*, 472 U.S. at 786 (Brennan, J., dissenting) (noting that the majority of the Court "provided almost no guidance as to what constitutes a protected 'matter of public concern'"); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO WASH. L. REV. 1, 3 (1990) (noting that the "public concern test . . . undermines the protection of speech that is important to public discourse"); William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, in SUP. CT. REV. 169, 202 n.175. (Dennis J. Hutchinson et al. eds., 1994) (observing that the Court's attempt to extend protection based on the issue involved in speech is "not without difficulty").

Occasionally juries are asked to distinguish between public officials, all purpose public figures, limited purpose public figures, and private figures, using a test which academics have found vacuous and unsupported. *See, e.g.,* Anderson, *supra* note 14, at 526–28 (arguing that the Court's rationalizations for the public/private figure distinction is "unconvincing"); Frederick Schauer, *Defamation and the First Amendment: New Perspectives: Public Figures*, 25 WM. & MARY L. REV. 905 (1984); Marshall & Gilles, *supra*, at 202–03 n.177 (noting that it is debatable whether the Court's rationalizations for the public/private figure distinction is persuasive). However, most courts treat the issue of a plaintiff's status as a question of law and rarely send it to the jury. *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966) (noting that "in the first instance" it is for the trial judge to determine the plaintiff's status); *see also* Anderson, *supra* note 14, at 501 (observing that "[t]he lower courts almost universally treat the question as one of law, to be decided by judges not juries").

¹⁷⁶ *See supra* notes 83–87.

C. Suggested Reforms—A More Balanced Approach

We can draw two radically different conclusions from these procedural failings. The first is that Justice Black was correct all along—that no amount of substantive or procedural reform will prove adequate, and thus the abolition of libel is the only viable option.¹⁷⁷ The second option is to redesign First Amendment process, this time taking into account the goals of speed and efficiency. The remainder of this Article takes this second path and advocates that the Court take a more balanced approach, creating a process responsive to all three goals.¹⁷⁸

As is now obvious, by focusing on accuracy and ignoring speed and efficiency, the Court has created a procedural system in which most of the protections occur too late to prevent delay and high costs. Yet, it makes no sense to force plaintiffs or defendants to go through a trial if appellate review will reverse the verdict. A better system (one that strives for speed and efficiency, as well as a reduction in pro-plaintiff error) would weed out cases where the plaintiff will not prevail early and would use appellate review as only the last, not the main, weapon to safeguard free speech values. What follows are proposals for how we can reform First Amendment process, especially the pre-trial procedure, to better meet all three goals.¹⁷⁹

1. Pleading Rules

The pleading stage seems an appropriate place to begin instituting procedural safeguards. Numerous jurisdictions require, as a matter of common law, that the libel plaintiffs plead the exact words of their libel or face

¹⁷⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 295 (1964) (Black, J., concurring). I find Justice Black's position, which would abolish libel suits by public officials on public issues, to be very persuasive. However, a majority of the Court has never supported this position and the current Court seems wedded to *New York Times*. Thus, this Article will instead address proposed procedural reforms.

¹⁷⁸ A third option, beyond the scope of this Article, would be to alter the substantive law of libel, for instance, by abolishing the actual malice rule. However, as more than one author has noted, the Court seems disinclined to alter, let alone abolish the actual malice rule. See Anderson, *supra* note 14, at 538 ("The Court has shown remarkable fealty to the [actual malice] rule and is probably unlikely to abolish it outright.").

¹⁷⁹ Rather than reforming the process per se, some scholars have suggested replacing the current libel action for damages with an action for declaratory judgment, dispute resolution programs, and no-money, no-fault system. For a review of these proposals, see Soloski & Bezanson, *supra* note 55.

dismissal.¹⁸⁰ This requirement could be adopted as a constitutional process requirement.¹⁸¹

A requirement that the plaintiff plead the exact words which she claims are defamatory should deter filing by those who have only a vague feeling that they have been wronged but cannot point to any specific factual error in the article. Because plaintiffs cannot ultimately prevail if they cannot identify and prove false specific factual statements, eliminating such claims at the outset would seem to be more efficient. A specificity requirement, although not immune to evasion by clever lawyers, would help the trial courts weed out such claims early in the litigation process.

Although the plaintiff should be entitled to amend her pleadings to meet the specificity requirement, amendments for the purpose of "shopping for libel" grossly increases the risk and costs of libel litigation and should be barred. A classic illustration of such a fishing expedition, in which a plaintiff files suit and constantly amends her complaint searching for something she can prove is libelous, was *Masson v. New Yorker Magazine, Inc.*¹⁸² In *Masson*, the Supreme Court noted that the plaintiff repeatedly changed the words he claimed were libelous until he found some not contained on the tape of his discussion with the reporter.¹⁸³ A constitutional process rule barring such amendments would greatly decrease the chill on defendants, as the ability of plaintiffs to harass

¹⁸⁰ See, e.g., *Vantasell-Martin v. Nelson*, 741 F. Supp. 698, 707 (N.D. Ill. 1990); *Rapp v. Parker*, 193 S.W. 535 (Ark. 1917); *Des Granges v. Crall*, 149 P. 777 (Cal. Ct. App. 1915); *Schulze v. Coykendall*, 545 P.2d 392 (Kan. 1976); *O'Brien v. Walsh*, 19 Media Rep. (BNA) 1511 (La. Dist. Ct. 1991); *Ledl v. Quik Pik Stores*, 349 N.W.2d 529, 532 (Mich. Ct. App. 1984); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 313 (Mo. Banc 1993); *Tindall v. Holder*, 892 S.W.2d 314, 327 (Mo. App. 1994); *Missouri Church of Scientology v. Adams*, 543 S.W.2d 776 (Mo. 1976); *Geddes v. Princess Properties Int'l, Ltd.*, 451 N.Y.S.2d 150, 150-51(1982); *Federal Land Bank of Baltimore v. Birchfield*, 35 S.E.2d 405, 410 (Va. 1939). But see *Pursell v. Wolverine Pentronix*, 205 N.W.2d 504 (Mich. 1973) (no special pleading requirements). Other states require specificity as a part of their retraction statutes. See, e.g., *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468 (S.D. Fla. 1987); *Gomes v. Fried*, 186 Cal. Rptr. 605 (Ct. App. 1982). At least one federal court has suggested that specificity in pleading is constitutionally required in First Amendment cases, while others have suggested that it should be adopted as a matter of federal policy. See *supra* note 54 and accompanying text.

¹⁸¹ As such, the requirement would be binding on all state and federal courts. Cf. *Schauer*, *supra* note 123, at 712-14 (criticizing *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), which required specificity of pleading on First Amendment grounds as a double counting that upset the balance of interest already formulated by the Court).

¹⁸² 501 U.S. 496 (1991).

¹⁸³ See *id.* at 502.

through broad accusations and discovery aimed at finding a libel would be prevented.

The benefits of such reforms are obvious in terms of both speed and inexpensiveness. They would also further First Amendment goals by limiting pro-plaintiff errors: Plaintiffs who cannot state a claim promptly, in precise terms, will see dismissal. The impact on plaintiffs who have valid claims should not be too severe. Libel law is designed to protect individual reputation from the impact of a false statement. It does not seem unfair to ask a plaintiff up front to identify what statements of and concerning her are false and defamatory. While the plaintiff needs discovery to find out if she can prove actual malice, it is hard to think why she needs discovery to find out if the information about her is false. Thus, requiring plaintiffs at the outset to state what is false seems a reasonable requirement that will serve all three goals of accuracy, speed, and efficiency.

Such a requirement is easily adopted. Many states already have pleading requirements in place—thus, the Court would have numerous models to draw from, building the constitutional process requirement on the basis of states' experimentations with common law requirements.¹⁸⁴ Moreover, the federal courts have always required that claims of fraud are to be pled with particularity,¹⁸⁵ and thus, a requirement of such specificity in libel cases would hardly prove novel or difficult to apply.

2. Controlling Discovery

A second improvement, which would serve the goals of speed and efficiency, as well as accuracy, is a reform of discovery. As we have seen, discovery is one of the most expensive stages in litigation. As long as the Supreme Court's ruling in *Herbert v. Lando*¹⁸⁶ stands, a trial court cannot deny, on First Amendment grounds, a plaintiff's requested discovery of editor's or reporter's thought processes, conversations, or notes. However, other process changes could make discovery more efficient. For instance, a

¹⁸⁴ See *supra* note 180 and accompanying text. In addition, federal trial courts already enjoy considerable discretion to require that plaintiffs reformulate and simplify their claims. See, e.g., FED. R. CIV. P. 16(c) (empowering the trial court, at a pre-trial conference, to "take [appropriate] action with respect to . . . (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; [and] (2) the necessity and desirability of amendments to the pleadings").

¹⁸⁵ FED. R. CIV. P. 9(b).

¹⁸⁶ 441 U.S. 153 (1979). However, as discussed in *supra* note 25, *Herbert* can be read as permitting trial courts to accommodate First Amendment interests, when they exercise their discretion to supervise discovery.

constitutional process could control the timing of such discovery.¹⁸⁷ Most beneficial, because actual malice is the issue that requires most of the discovery in a libel suit, would be to delay discovery on actual malice until discovery on other issues such as falsity or common law privileges has been completed and any motions filed. Thus, if the plaintiff's claim comes up short on other grounds, there would be no need to grapple with this massive factual inquiry. Equally, even when it allows discovery on actual malice, the Court could limit that discovery to diminish the chill. A number of Justices in *Herbert* suggested that such a consideration was appropriate.¹⁸⁸

Once again, these reforms are hardly revolutionary. Most trial courts already have considerable powers to control discovery. For instance, under the federal rules, a federal trial court can control the order and scheduling of discovery.¹⁸⁹ Equally, the prevention of unreasonably cumulative or burdensome discovery is a standard part of most discovery rules.¹⁹⁰ Federal Rule 26 authorizes a federal trial court to prevent repeated depositions, to preclude multiple depositions if key information has been supplied, and perhaps to take into account the special First Amendment concern of over burdening the press because the rule specifically instructs the courts to examine the "importance of the issues at stake in the litigation."¹⁹¹ If these concerns were constitutionalized, then all state as well as federal courts would have an obligation to manage discovery to avoid unnecessary costs and vindicate First Amendment interests.

¹⁸⁷ Justice Brennan made a similar suggestion in his opinion in *Herbert*, proposing that discovery into editorial discussions be barred until the plaintiff had made a prima facie demonstration that the publication constitutes defamatory falsehood. See 441 U.S. at 181 (Brennan, J., dissenting). Justice White rejected this suggestion as likely to create an expensive, bifurcated system. See *id.* at 174-75 n.23.

¹⁸⁸ See *id.* at 178-80 (Powell, J., concurring); *id.* at 180-95 (Brennan, J., dissenting); *id.* at 200-02 (Stewart, J., dissenting); *id.* at 202-09 (Marshall, J., dissenting); see also *supra* notes 25, 186 and accompanying text.

¹⁸⁹ See FED. R. CIV. P. 16(b), 26(f).

¹⁹⁰ See FED. R. CIV. P. 26(b)(1). Federal Rule 26 allows federal trial courts to limit discovery if it is "obtainable from some other source that is more convenient, less burdensome, or less expensive" or if the party seeking the information "has had ample opportunity by discovery in the action to obtain the information sought." *Id.* at 26(b)(1)(i)-(ii). Most importantly, the trial court can cutoff discovery if "the burden and expense of the discovery outweighs its likely benefits." *Id.* at 26(b)(1)(iii).

¹⁹¹ *Id.* at 26(b)(1)(iii).

3. *Interlocutory Appeal of Summary Judgment*

The Court has already promoted summary judgment in libel cases by its ruling in *Anderson v. Liberty Lobby, Inc.*¹⁹² The clear and convincing standard of proof has been applied and issues of actual malice have been held appropriate for summary judgment.¹⁹³ However, as we have seen, pro-plaintiff errors remain—reflected in the high reversal rates of denials of defense motions for summary judgment.¹⁹⁴ To cure this defect, the Court should allow interlocutory appeals of denials of summary judgment in libel cases.¹⁹⁵

Such a reform would serve process goals. First, it should reduce pro-plaintiff errors with far less cost and in a shorter length of time. Rather than reversing, post trial, a case where there was no evidence of actual malice, the reversal could be immediate—saving plaintiffs, defendants, and the public, the cost of a trial. Of course, an intermediate appeal would cause delay and some increased cost in cases in which the trial court had correctly denied summary judgment—because an additional level of appeal would be inserted into the process.¹⁹⁶ However, this cost seems justified. First, the cost of a baseless appeal of a summary judgment motion is much less than the cost of an unnecessary trial. Second, only a small number of cases would be affected. All

¹⁹² 477 U.S. 242 (1986) (reversing lower court's holdings because the evidentiary standard employed by the court was not clear and convincing).

¹⁹³ See *id.* at 244; see also *supra* notes 37–48 and accompanying text. In addition, the Court has narrowly defined “genuine issues of material fact” to cover only dispute of facts going to elements of the claim which are of such magnitude that no reasonable jury could find for the non-moving party. *Id.* at 247–52.

Moreover, the Court, while taking care not to say that judges can decide credibility, has called on the trial courts to weigh the quality and caliber of the evidence in determining if summary judgment can be granted. See *id.* at 249.

¹⁹⁴ See *supra* note 82 and accompanying text.

¹⁹⁵ Cf. *Anderson*, *supra* note 14, at 541 (suggesting that perhaps interlocutory appeals would help to secure trial judges' decisions in advance of trial).

Appellate reversal rates for denials of summary judgment would not of course equal post trial reversal rates. Appellate courts have a tendency to let the plaintiff have her day in court. Moreover, while summary judgment might not be appropriate in a given case based on the state of the record at the time of the motion, after a trial the trial record might make apparent the defense's right to judgment as a matter of law. Equally, while an interlocutory appeal would be appropriate if the trial court misstates or misapplies the law, it would not be appropriate when summary judgment is denied because there is a genuine issue of material fact. See *Johnson v. Jones*, 515 U.S. 304 (1995); *infra* note 198 and accompanying text.

¹⁹⁶ This cost would fall on plaintiffs and defendants alike, because both sides would have to brief the issues on appeal. However, the increased cost might have a greater impact on the plaintiff because the defendant (often a media corporation or its insurer) is more able to absorb increased litigation costs.

grants of summary judgment are already immediately appealable, as they are final orders disposing of the case, therefore, the only cases affected would be denials of summary judgment. Third, the increased cost should be balanced against the reduction in pro-plaintiff error—an equally important goal of First Amendment process.

A finding that constitutional concerns mandate an interlocutory appeal is not without precedent in the federal system. The Supreme Court has already held that interlocutory appeals are permissible in one area—when the trial court rejects a claim of privilege by a government official sued under § 1983.¹⁹⁷ The Supreme Court has repeatedly affirmed and indeed expanded this holding.¹⁹⁸

One of the rationales for recognizing a right to an interlocutory appeal in the privilege cases exactly parallels the issues raised in First Amendment process cases: the costs of discovery and trial.¹⁹⁹ Moreover, some states, New York in particular, do allow intermediary appeals of summary judgment denials.²⁰⁰ A review of the appellate reversal rates in this state suggests that the

¹⁹⁷ See *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding that a trial court ruling denying an asserted qualified immunity is immediately appealable).

¹⁹⁸ See *Behrens v. Pelletier*, 116 S. Ct. 834 (1996) (permitting multiple appeals on the issue of qualified immunity); cf. *Johnson*, 515 U.S. at 304 (holding that a denial of summary judgment on grounds that there was a genuine issue of material fact, rather than on the merits, did not warrant an interlocutory appeal).

¹⁹⁹ See *Mitchell*, 72 U.S. at 526–27 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982)). The Court noted that an interlocutory appeal would permit government officials to avoid the “costs of trial [and] the burdens of broad-reaching discovery.” *Id.*

The move to allow interlocutory appeals in qualified immunity cases followed the same pattern as the decisions in libel cases. The Court first tried to make summary judgment effective. In *Harlow*, the Court expressly attempted to make summary judgment easier for defendants to obtain by reformulating the substantive test. See 457 U.S. at 815–19. Next, in *Mitchell*, realizing that when summary judgment was denied, the officials still faced the costs of discovery and trial, the Court allowed interlocutory appeals. See 472 U.S. at 526–27. In libel cases, the Court has already taken the first step—making summary judgment more available. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). It would seem logical that if the Court is serious in this endeavor, the Court would inevitably take the second step and permit interlocutory appeals of denials of summary judgment.

This is not to suggest that the doctrines are parallel. As pointed out in *Mitchell*, the entitlement asserted by the defendants is not simply a defense, but a right to “immunity from suit.” 472 U.S. at 526. In libel cases, the claimed right is not an immunity.

On the other hand, the claim to an interlocutory appeal can be viewed as stronger in libel than in governmental immunity cases. The government official’s right to immunity is based on common law, not constitutional right. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In libel cases, the concern for chill, which motivates the demand for an interlocutory appeal, is of constitutional dimension. Thus, the claim for interlocutory appeals in libel cases may be stronger.

²⁰⁰ See New York C.P.L.R. § 5701(a) (permitting interlocutory appeals).

introduction of interlocutory appeals in all libel cases would be profitable. For instance, there were 22 reported interlocutory appeals of denials of defense motions for summary judgment in libel cases in New York between 1986 and 1994.²⁰¹ In 14 of these interlocutory appeals (63.6%), the denial was reversed; in 6 of these interlocutory appeals (27.2%), the denial was partially reversed; and in 2 of these interlocutory appeals the denial of summary judgment was affirmed.²⁰² In short, 90.9% of interlocutory appeals by defendants of denials of summary judgment resulted in complete or partial reversal.²⁰³ While these figures are subject to qualifications,²⁰⁴ they do indicate that interlocutory appeals would lead to the immediate reversal and dismissal of a high proportion of cases—saving the resources of plaintiffs, defendants and the system alike.

4. *Actual Malice as a Question of Law*

One final reform could be adopted, designed to correct the high level of error at the trial stage could be adopted. The Court could hold that actual

²⁰¹ This figure, and those cited in the following notes, was obtained by reviewing the cases reported in LDRC SJ Update, *supra* note 39, at Appendix B (Summary Judgment Cases Reported 1986–1994). The LDRC report lists the summary judgment cases decided in New York between 1986 and 1994. *See id.* A review of those cases reveals that 22 of these cases are reports of interlocutory appeals of denials of defense motions for summary judgment, 14 (63.6%) saw a reversal of the denial of summary judgment and an additional 6 (27.2%) saw a partial reversal (i.e., there were multiple claims and the denial of summary judgment was affirmed as to some of those claims and reversed as to others). Thus, the disturbance rate on interlocutory appeals of denials of defense motions for summary judgment was 90.9% (combining the reversal and partial reversal rates). A memorandum listing the cases and detailing the interlocutory appeals is on file with the author.

²⁰² *See id.*

²⁰³ *See id.*

²⁰⁴ First, the LDRC statistics include both public and private figure cases. In New York the standard for private figures is unusually high—gross irresponsibility. *See Chapadeau v. Utica Observer Dispatch, Inc.*, 341 N.E.2d 569, 571 (1975). In contrast, most States post-*Gertz* adopted a simple negligence standard. *See FRANKLIN & ANDERSON, MASS MEDIA L.* 283–84 (5th ed. 1990). Thus, it is possible that the high reversal rate in New York is due, in part, to this heightened fault standard, and that other states would not see these dramatic reversal rates following the adoption of interlocutory appeals.

Secondly, New York has one of the lowest rates for trial court grants of summary judgment, and this may explain the high level of appellate reversals. *See LDRC SJ Update, supra* note 39, at 14–15, 18 (noting that New York has a low trial court grant rate and a high appellate reversal rate)

malice is a question of law.²⁰⁵ Again, this step is hardly radical. First, the courts have treated other key libel issues as questions of law. For instance, whether the plaintiff is a public or private figure is a question of law to be decided by the court.²⁰⁶ Moreover, the Court's holding in *Bose* that the finding of actual malice should be independently reviewed by the appellate courts already treats the issue of actual malice as closer to a question of law than of fact.²⁰⁷ The reform would also help the Court clear up the confusion created by its decisions in *Bose* and *Connaughton* on how to treat jury findings regarding the issue of actual malice.²⁰⁸ Under this proposal, the jury would determine any disputed facts by responses to special interrogatories.²⁰⁹ For instance, a jury might be asked: Did the reporter lie about what a witness said in an interview, or did an editor change the meaning of the reporter's story? The trial court would then be required to determine if, given these factual findings, these actions constituted actual malice.²¹⁰

²⁰⁵ Of course, the Court could abolish actual malice, which would result in a drastic reshaping of the constitutional law of libel. See *supra* note 178. Here the proposed change is not to repeal this substantive standard, but rather, to treat it as a question of law—not fact.

²⁰⁶ See *supra* note 175.

²⁰⁷ See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (holding that the issue of actual malice is a question of “constitutional fact” and subjecting it to a heightened level of appellate review). As one author has noted, the Court never clearly articulated whether it views the issue of actual malice as a question of fact, law, or mixed fact and law. See Tigran W. Eldred, Note, *Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases*, 57 FORDHAM L. REV. 579, 583 (1989). For the lower courts interpretation of *Bose*, see *supra* notes 70–73 and accompanying text.

²⁰⁸ See *Bose*, 466 U.S. 485; *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 485 (1984) (discussed at length in *supra* note 71). For criticism of *Bose*'s reasoning, see *Matheson*, *supra* note 14, at 278 n.365 (opining that the Court's analysis “leaves much to be desired”); Henry P. Monaghan, *Constitutional Fact Review*, 85 COL. L. REV. 229, 242 (1985) (asserting that the Court's reasoning was simply “backing and filling”); Eldred, *supra* note 207 (concluding that the Court's reasoning was unclear, leaving numerous issues to be resolved by lower courts); and articles cited *infra* note 211.

²⁰⁹ In most cases, there are few disputed facts. Plaintiff is rarely in a position to introduce evidence to contradict the reporter's testimony as to sources or the editor's testimony as to editorial changes. Rather, the key dispute is usually whether given these facts, the defendant's conduct amounts to actual malice. It is this issue that I would propose to make an issue of law for the Court. Cf. Anderson, *supra* note 14, at 512 (arguing that actual malice is a “peculiarly jury function” because it requires the drawing of inferences). For a similar proposal to use special interrogatories, see Eldred, *supra* note 207, at 596–99, and J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 551–53 (1985) (in government employee speech cases).

²¹⁰ The process of review that the appellate courts now undertake is similar. For instance in *Connaughton*, the Court tried to reconstruct the factual finding the jury “must

This reform seems justified by the high reversal rate of juries on the issue of actual malice. Moreover, as I have suggested, the high degree of error may well be due to the complexity of the definition of actual malice. Given this complexity, asking a jury to decide if actual malice exists is inviting a jury to err. The advantages of such a reform are obvious. First, it should decrease the level of error at the trial level on the issue of actual malice. Second, it may further increase the number of summary judgment motions which are granted, if it is clear that actual malice is a question of law for the court—thereby increasing speed and efficiency. Third, it may clarify the Court's confusing and seemingly contradictory holdings in *Connaughton* and *Bose* on how independent review is supposed to work.²¹¹

Those opposed to actual malice being a question of law would cite the Seventh Amendment and its protection of the role of the jury in civil trials. Yet, if actual malice is a question of law, there should be no Seventh Amendment concern.²¹² Rather, it is the Court's current position—declaring actual malice to

have" reached, and then addressed whether given these facts, actual malice could properly be found. See 491 U.S. at 690-93.

²¹¹ There are several articles for criticism and comment on *Bose* and *Connaughton*. See generally George C. Christie, *Judicial Review of Findings of Fact*, 87 N.W.U. L. REV. 14 (1992); Lucan et al., *supra* note 70; Matheson, *supra* note 14, at 271-84; Monaghan, *supra* note 208, at 229-76; Eldred, *supra* note 207; Cathy Parker, Recent Development, *Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases*, 60 WASH. L. REV. 503 (1985); Gary Anthony Paranzino, Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV. 477 (1986); Sujyot S. Patel, Recent Case, *Harte-Hanks Communications, Inc. v. Connaughton: The Application of the New York Times Standard*, 16 OHIO N.U. L. REV. 725 (1989).

²¹² The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. As the Court noted in *New York Times*, 376 U.S. at 285 n.26, this does not preclude the federal courts from deciding issues of law or from reviewing factual findings in which issues of law and fact are intermingled. See also *Hurley v. Irish-American Gay and Lesbian Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (citing *Fiske*); *Fiske v. Kansas*, 274 U.S. 380, 385-87 (1927); Marc E. Sorini, Note, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 GEO. L.J. 563, 588 (1993).

In addition, some scholars have questioned if the Seventh Amendment even applies to the actual malice question in defamation cases. See Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 40-43 (1985); Eldred, *supra* note 207, at n.85. Moreover, as one scholar has noted, the Supreme Court and the federal appellate courts have not actively enforced the Seventh Amendment for the last twenty years. See Schnapper, *supra* note 85, at 353-54 (reporting a "protracted suspension of the enforcement of the seventh amendment").

be an issue of fact and yet allowing independent appellate review—that seems to be a more glaring violation of the Seventh Amendment.²¹³

A second, more profound objection is that allowing the courts to decide actual malice as a question of law further eviscerates the role of the jury in libel cases.²¹⁴ Juries may now be the enemy of the press, but in earlier eras they acted as the protectors of the press.²¹⁵ It is a risky gamble to take the jury out of

²¹³ See *New York Times*, 376 U.S. at 285 n.26; *Bose*, 466 U.S. at 498–514 (distinguishing the standard of review of facts under the Rule 52 clearly erroneous standard from the standard of review to be applied to constitutional facts like actual malice).

²¹⁴ A third objection would be that issues of law and fact are distinct, and one cannot simply be declared to be the other. Two rebuttals can be offered. First, some have argued that the law/fact distinction is fundamentally incoherent—being manipulable at will by the court. See Monaghan, *supra* note 208, at 233 (reporting, but rejecting this position). Even if we accept the distinction, it is clear that the line between law and fact is a policy question—how to allocate decisionmaking authority between judges and juries. See *id.* at 235–37; *Bose*, 466 U.S. at 501 n.17 (noting that where the line is drawn between law and fact “varies according to the . . . substantive law at issue” and arguing that some questions of fact are too important (in terms of impact on future cases and future conduct) to “entrust them finally to the judgment of the trier of fact”); see also Christie, *supra* note 211, at 27–28 (discussing Monaghan’s thesis); Keeton, *supra* note 70, at 1346 (noting that the distinction of law and fact is as much a matter of allocation as it is of analysis).

As Monaghan points out, there are three, not two, functions: “law declaration, fact identification, and law application.” See Monaghan, *supra* note 208, at 234. Law declaration (announcing legal principles) is universally recognized as an issue for the court; and fact identification (inquiring, specifically, into what happened here) is acknowledged as best left to the jury. However, it is simply a policy choice whether to allocate the “law application” function (relating the legal standard of conduct to the facts established by the evidence) to the court or to the jury. See *id.* at 235–37.

I simply propose that, given the policy considerations discussed above, the “law application” process of applying actual malice to facts found by the jury be declared a question of law for the courts. In some sense this is purely semantic, because the Court in *Bose*, by calling the issue one of constitutional fact and requiring judges to independently assess if there was actual malice, has de facto transferred this function to the court. See *Bose*, 466 U.S. at 485; Monaghan, *supra* note 208, at 237–38 (noting *Bose* gives the law application function on First Amendment issues to the court). However, calling the issue one of law would, I think, provide the three benefits set out above—encouraging trial courts to grant summary judgment, allowing the court at trial to simply submit special interrogatories on the facts and itself assess actual malice, and clarifying the confusion in the Court’s opinions in *Bose* and *Connaughton* as to how independent review works. See also Eldred, *supra* note 207, at 584–93 (suggesting that actual malice be divided into a factual inquiry and a legal inquiry).

²¹⁵ For a powerful presentation of this historical argument see Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 761–69 (1986); see also Anderson, *supra* note 14, at 539–40 (noting the past role of juries as protectors of the press, but concluding that given current public opinion it would be “nostalgic nonsense” to let

the equation. Yet, I would suggest that independent appellate review has already effectively done this. The present system gives the impression that the jury controls the outcome, yet the reversal rates show us a reality in which the jury's verdict is swept aside again and again on appellate review.²¹⁶ Would it not show more respect for the jury to admit candidly what is already a reality: that actual malice is being decided by the courts, not the jury?

This list of proposed reforms does not purport to be exhaustive, but it does illustrate that if the Court were to adopt a balanced approach, recognizing that speed and efficiency are important considerations, then First Amendment process could be fashioned to benefit defendants, plaintiffs, and the public. Process protections could be increased at the outset of the law suit and interlocutory appeals could ensure that the appellate protection already created by the Court could be accessed with greater speed and economy. In contrast to the Court's series of ad hoc rulings, it is indeed possible to come up with a series of reforms that render more rational and improve the process of deciding First Amendment cases.

IV. CONCLUSION

It is time to take First Amendment procedure seriously. Instead of protesting that it has no doctrine to guide its decisions and tacitly creating a process that promotes accuracy at the expense of speed and efficiency, the Court should explicitly undertake to determine what goals should be furthered by a First Amendment process. I would urge the Court to adopt a more balanced approach and to reform the procedural disaster its ad hoc rulings have created.

them continue in this role). *But see* Levine, *supra* note 212 (advocating further limitations on jury power in libel cases); Doug Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769, 778-87 (1977) (urging similar limitations in libel cases).

²¹⁶ See *supra* notes 83-87 and accompanying text (discussing reversal rates in libel cases). One author reaches a similar conclusion on the need to change the relation of judge and jury. See Anderson, *supra* note 14, at 540 (arguing that "[w]e may as well be candid: constitutional protection of speech against the chilling effects of libel consists primarily of rules encouraging judges to decide factual matters that previously were left to juries"); cf. Monaghan, *supra* note 208, at 269-70 (arguing that *Bose* was erroneously decided and that there is no justification for independent review in First Amendment cases).